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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 61

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

HENRY BROCH AND COMPANY

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

PETITION FOR CERTIORARI FILED MAY 6, 1959

CERTIORARI GRANTED JUNE 15, 1959

SUPREME COURT OF THE UNITED STATES

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HENRY BROCH AND COMPANY

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[fol. a]

**IN THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT**

No. 12305

HENRY BROCH AND COMPANY, Petitioner,

vs.

FEDERAL TRADE COMMISSION, Respondent

PETITION FOR REVIEW OF ORDER OF THE FEDERAL TRADE
COMMISSION

Joint Appendix

[fol. 1] SUMMARY OF PROCEEDING BELOW

The Federal Trade Commission issued its complaint in this matter on January 11, 1956, and the petitioner, Henry Broch & Co., was served on January 19, 1956. Petitioner filed its answer on February 17, 1956.

Hearings were held before a Hearing Examiner on various dates between May 8, 1956, and October 3, 1956, at Chicago, Illinois, and Pittsburgh, Pennsylvania. Pursuant to an order of the Hearing Examiner dated July 9, 1956, the oral deposition of Mr. Koldinsky, manager of the seller firm, was taken on August 6, 1956, at Kentville, Nova Scotia.

At the close of all the evidence proposed findings of fact, conclusions of law and order were filed by counsel for the Commission and counsel for Henry Broch & Co., on November 15 and 16, 1956, respectively. The Hearing Examiner filed his initial decision on February 26, 1957, and entered a cease and desist order directed against petitioner.

Henry Broch & Co., filed a notice of appeal from the initial decision on March 13, 1957. On September 24, 1957, oral argument was heard before the full Commission and on December 10, 1957, the Commission denied the appeal and adopted as its own the initial decision of the Hearing Examiner.

On April 19, 1958, the petition for review was filed with the Clerk of this Court.

BEFORE FEDERAL TRADE COMMISSION

Docket No. 6484

In the Matter of HENRY BROCH and OSCAR ADLER, Copartners Trading as HENRY BROCH & Co.

COMPLAINT—Issued Jan. 11, 1956

The Federal Trade Commission, having reason to believe [fol. 2] that the parties respondent named in the caption hereof, and hereinafter more particularly designated and described, since June 19, 1936, have violated and are now violating the provisions of subsection (c) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

Paragraph One: Respondent Henry Broch and respondent Oscar Adler are copartners trading as Henry Broch & Co. (each of said respondents hereinafter designated as respondents or said respondents), with their principal office and place of business in the Hyde Park National Bank Building, located at 1525 East 53rd Street, Chicago, Illinois.

Paragraph Two: Said respondents are now engaged, and have engaged since August of 1942, in business as brokers or sales representatives of seller principals, negotiating the sale of frozen foods, frozen fruits, fruit juices, and other food products (all of which are hereinafter designated as food products) for and on account of twenty-five or more sellers as principals. Said respondents are compensated for making sales of their respective seller principals' food products by being paid a commission or brokerage fee by the respective seller principals. Such commissions or brokerage fee by the respective seller principals. Such commissions or brokerage fees usually range from 2 percent to 5 percent of the net purchase price of the food product sold. Said respondents sell such food products to buyers located in various cities and towns in many of the states of the United States, who are chiefly engaged in business as food manufacturers or distributors of food products. Re-

spondents are a substantial factor in the sale of such food products, their sales approximating from \$6,000,000 to \$7,000,000 annually.

Paragraph Three: In the course and conduct of their business said respondents are now, and since August of 1942 have been, engaged in commerce, as "commerce" is defined in the Clayton Act as amended by the Robinson-Patman Act. Said respondents, during the period stated, as brokers or sales representatives for their sellers as principals, have sold food products to buyers located in [fol. 3] the various states of the United States and caused said food products so purchased to be transported from the respective sellers' places of business to destinations in other states where such buyers were located. Thus there is, and has been at all times mentioned herein, a continuous course of trade in commerce in said food products across state lines.

Paragraph Four: Said respondents, in the course and conduct of their business in commerce as brokers, or sales representatives of seller principals, have since August of 1942 received and accepted from such seller principals commissions or brokerage fees for their services in negotiating the sale of such food products for such seller principals.

Said respondents customarily receive, accept and retain all such commissions or brokerage fees earned by performing the services of negotiating the sale of such food products for their respective seller principals. This phase of said respondents' business is not challenged by the complaint herein.

Said respondents, however, in the course and conduct of their business as brokers or sales representatives of a seller principal, have granted and allowed a buyer a certain percentage, approximately 60 percent, of the brokerage fee or commission paid by the seller principal for services by respondents in connection with such sale.

Said respondents, on or about October of 1954, in the course and conduct of their business as aforesaid for a seller principal located at Kentville, Nova Scotia, made a substantial sale of one of said seller principal's food products to a buyer located at Orrville, Ohio. Said re-

spondents, in making such sale, earned their normal and customary commission or brokerage fee of 5 percent, customarily granted and allowed, but did not receive all of such normal brokerage, as respondents requested said seller principal to lower its established price of the food product to the buyer, and requested said seller principal to recoup part of such loss by deducting a percentage of approximately 60 percent of the customary rate of commission or brokerage fee regularly allowed said respondents and other brokers, for negotiating the sale of such product. The seller acceded to respondents' request, lower-[fol. 4] ing the price to the buyer and invoicing, shipping, and collecting from the buyer at a price lower than its customary price and thereafter granting and allowing the respondents the lower rate of brokerage it had agreed to. This transaction in the conduct of respondents' business is challenged by the complaint herein.

Paragraph Five: The foregoing acts and practices of the respondents, and each of them, in granting and allowing a percentage of the commission or brokerage fee, directly or indirectly, to a buyer of food products in commerce, in connection with such buyer's purchase of such food products in commerce, are in violation of subsection (c) of Section 2 of the Clayton Act, as amended.

Wherefore, the Premises Considered, the Federal Trade Commission on this 11th day of January A. D. 1956, issues its complaint against said respondents.

Notice

Notice is hereby given you, Henry Broch and Oscar Adler, copartners trading as Henry Broch & Co., respondents herein, that the 13th day of March A. D. 1956, at 10 o'clock is hereby fixed as the time and Federal Trade Commission Office, 226 West Jackson Boulevard, Chicago, Illinois, as the place when and where a hearing will be had before a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. Such answer shall contain a concise statement of the facts constituting the ground of defense and a specific admission, denial or explanation of each fact alleged in the complaint or, if respondents are without knowledge thereof, a statement to that effect.

If respondents elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a [fol. 5] statement that respondents admit all material allegations to be true. Such an answer shall constitute a waiver of hearing as to facts so alleged, and an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding shall be issued by the hearing examiner. In such answer, respondents may, however, reserve the right to submit proposed findings and conclusions and the right to appeal under Section 3.22 of the Commission's Rules of Practice for Adjudicative Proceedings.

If any respondent elects to negotiate a consent order, it shall be done in accordance with Section 3.25 of the Commission's Rules of Practice.

Failure to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize a hearing examiner, without further notice to respondents, to find the facts to be as alleged in the complaint, to conduct a hearing to determine the form of order, and, thereafter, to enter an initial decision containing such findings and order.

In Witness Whereof, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 11th day of January 1956.

By the Commission, /s/ Robert M. Parrish, Secretary.

BEFORE FEDERAL TRADE COMMISSION

ANSWER—Filed Feb. 17, 1956

Respondents, Henry Broch and Oscar Adler, copartners trading as Henry Broch & Co., by their attorneys, Harold Orlinsky and Fred Herzog, state and allege in answer to the Complaint filed herein as follows:

I

That the following statement of facts constitutes respondents' ground of defense:

The respondents are doing business as brokers or sales representatives of seller principals. Their commission or [fol. 6] brokerage fees usually range from two per cent to five per cent. There is, however no commission or brokerage fee for any of the products for which they negotiate sales that is recognized either by them or their seller principals or in the trade as normal or customary. They naturally try to get the highest brokerage fee which they are able to negotiate with their seller principals, and sometimes have to negotiate with the same seller principal separately on each sale negotiated. Their commission or brokerage fee for the sale of food products such as are involved in this complaint, may vary from time to time and from sale to sale, even for the same seller principal and involving the same product, depending upon the size of the sale, the time of the year, whether it is a seller's or buyer's market, how anxious the seller principal is to sell, whether the seller principal is under- or overstocked, the competition present and its intensity, and any number of other factors.

Sometime after the time that the seller principal involved in the present case had first agreed to authorize respondents to act as its sales broker, and before any sales were made, said principal had agreed to pay respondents a brokerage fee of five per cent. However, that fee was based on contemplated sales of much smaller quantities than the sale in question forming the subject matter of this complaint. It was not then contemplated by either said seller principal or by respondents that respondents would be able to negotiate a sale of the size or quantity

as was negotiated in the present case. In fact, the buyer in question is perhaps the only user of apple concentrate in the United States that could purchase said product in such large quantities. Its first order, which is the sale in question, was for five hundred (500) steel drums of fifty-five (55) to sixty (60) gallons each. Previous to this order, the largest quantity of said seller principal's apple concentrate sold by respondents to any one buyer was seventy-five (75) steel drums and most of the orders were much smaller than that.

The price which the seller principal first quoted to respondents for concentrate in steel drums was \$1.85 a gallon. From time to time, however, new prices were quoted, [fol. 7] resulting eventually in the lowering of the price in the early part of October 1954 to \$1.30 a gallon. Yet, in the latter part of October 1954, the seller principal notified the respondents that, due to the unstable situation in the apple concentrate field, it would be necessary to check with seller principal, prior to any sale whatsoever, with respect to price, quantity, brokerage commission and any other terms and conditions.

Shortly thereafter, the respondents notified the seller principal that the buyer in question was willing to place a large order for five hundred (500) steel drums or more, if said seller principal could compete in price with certain French producers. Taking into consideration that the French sellers were shipping through New Orleans instead of New York, resulting in savings in freight charges to middle-west purchasers, the French product, particularly when purchased in larger quantities, would run considerably less to middle-west purchasers than the \$1.30 a gallon tentatively quoted by respondents in behalf of the seller principal. Aware of these factors and also of the prices quoted by Canadian competitors, the seller principal responded that there were certain savings which would result to it in the cost of handling and delivery in the sale of carload lots of that size; it, therefore, instructed respondents that they could quote a price of \$1.25 a gallon on such an order, which price, it hoped, would meet the competition of the French producers as well as that of Canadian producers. At that time, said seller principal stated categorically that on sales of such size and quantity it paid a brokerage commission of three (3) per cent.

On the basis of this quoted price the buyer in question placed an order for five hundred (500) steel drums of apple concentrate, which order was, on November 3, 1954, forwarded to said seller principal. After the said five hundred steel drums of said product were delivered to the buyer and paid for, said seller principal sent a check for three (3) per cent of the net price to respondents to cover their brokerage fee.

At no time was there any discussion or negotiation between respondents and seller principal concerning said seller principal recouping any loss out of respondents' [fol. 8] commission. There was no loss to recoup. The purchase of such a large quantity created savings to the seller principal in the cost of handling and delivery of the goods sold, so that no loss resulted to the seller principal from the lowering of the price by five (5) cents a gallon, which previously quoted price, by the way, as mentioned before, was not an established price but fluctuated according to a variety of conditions. The setting of the commission at three (3) per cent instead of five (5) per cent was in no way tied up or connected with the setting of the price for the sale in question. It is often that respondents' percentage rate of commission varies with the size of the sale, and the larger the sale the smaller the commission—a fact well known and encountered in other fields, too. Such arrangement is acceptable to respondents, because they recognize the logic in it. For example, the brokerage commission earned on five hundred (500) drums at three (3) per cent would be equal to the commission on five (5) different sales to five (5) different purchasers of seventy-five (75) drums each, at five (5) per cent commission, which would require five times the effort and increased office expense of handling five orders and five accounts instead of one order and one account.

Moreover, at no time did the buyer in question know what respondents' rate or amount of commission was.

II.

That respondents make the following specific denials and admissions of the facts alleged in the complaint:

1. They admit the allegations contained in paragraph 1 of the complaint.

2. As to paragraph 2 of the complaint, they deny that they are a substantial factor in the sale of food products and that their sales approximate from \$6,000,000 to \$7,000,000 annually; however, they admit all the other allegations contained in said paragraph 2 of the complaint.

3. They admit the allegations contained in paragraph 3 of the complaint.

4. As to paragraph 4 of the complaint, they say the following:

(a) They deny the allegation contained therein that [fol. 9] they, in the course and conduct of their business as brokers or sales representatives of a seller principal, have granted and allowed a buyer a certain percentage, approximately 60 percent, of the brokerage fee or commission paid by the seller principal for their services in connection with such sale; and state the fact to be that, as such brokers of a seller principal, they have never granted or allowed any buyer 60 percent or any other percent of their brokerage or commission in connection with any sale.

(b) They deny the allegation contained therein that they, in making the sale alleged therein, earned their normal and customary commission or brokerage fee of 5 percent; and state the fact to be that there is no commission or brokerage fee for such sale which is recognized by them, or by their seller principals, or in the trade, as normal or customary, as is more fully set forth in the statement of facts in Part I of this Answer.

(c) They deny the allegation contained therein that they requested said seller principal to lower its established price of the food product to the buyer; and state the fact to be that, at the time in question, there was no established price for such a sale of said product, as is more fully set forth in the statement of facts in Part I of this Answer.

(d) They deny the allegation contained therein that they requested said seller principal to recoup part of the loss sustained by said seller principal by deducting 60 percent of their brokerage or commission; and state the fact to be that they never requested the seller principal to recoup anything at all as to this buyer

or any other buyer and that they never requested said seller principal to deduct 60 percent or any other percent of their commission or brokerage fee for negotiating the sale in question, as is more fully set forth in the statement of facts in Part I of this Answer.

(c) They admit all the other allegations in said paragraph 4 of the complaint.

[fol. 10] 5. They deny the allegations contained in paragraph 5 of the complaint, and state that they and each of them, did not ever grant or allow a percentage of their commission or brokerage fee, either directly or indirectly, to a buyer of food products and that they are not guilty of any acts or practices which are in violation of subsection (c) of Section 2 of the Clayton Act, as amended.

s/ Harold Orlinsky and Fred Herzog, Attorneys
for Respondents, Henry Broeh and Oscar Adler,
copartners trading as Henry Broeh & Co., 120 S.
La Salle Street, Chicago 3, Illinois. Tel: Financial
6-3848.

BEFORE FEDERAL TRADE COMMISSION

ORDER GRANTING MOTION TO TAKE

THE DEPOSITION OF L. KOLDINSKY—July 9, 1956

Counsel for respondents have filed a motion to take the deposition of L. Koldinsky, Manager of the Fruit Division of Canada Foods Limited, Kentville, Nova Scotia, on oral interrogatories to be propounded to him, before Dr. Webster McDonald, a Notary Public, at 11 Webster Street, Kentville, Nova Scotia. The reason stated for the request to take such deposition is that witnesses called in support of the complaint have testified concerning certain telephone conversations and negotiations involving L. Koldinsky, and the testimony of said individual concerning said negotiations and discussions is material and relevant to the issues in this case and necessary for a full and proper determination of said issues.

Counsel supporting the complaint has filed an answer in opposition to the application herein on the ground that the testimony of L. Koldinsky may be in direct conflict

with the testimony of witnesses who have testified in support of the complaint and that it is important for the hearing examiner to have the opportunity of listening to the testimony of said witness and observing his demeanor. [fol. 11] Counsel supporting the complaint has further stated that it is his understanding that L. Koldinsky is frequently in the United States on business and that he has no objection to the calling of Mr. Koldinsky as a witness at any point within the continental United States where the examiner will have an opportunity to hear and observe said witness.

In view of the apparent importance of the testimony of L. Koldinsky in this proceeding, the undersigned has communicated with counsel for respondents to ascertain whether it would be possible to have said individual appear as a witness within the continental United States. Counsel for respondents have advised the undersigned that it will not be possible to produce said individual as a witness within the United States. However, they have further stated that they have no objection to the undersigned being present at the taking of the deposition, addressing appropriate questions to the witness, and observing the demeanor of the witness in testifying. Counsel supporting the complaint has also advised the undersigned that he does not object to the undersigned being present at the taking of the deposition under the same conditions as above stated. Accordingly,

It Is Ordered that the motion of respondents to take the deposition of L. Koldinsky in Kentville, Nova Scotia, be, and the same hereby is, granted, and

It Is Further Ordered that said deposition shall be taken before Dr. Webster McDonald, a Notary Public, at 11 Webster Street, Kentville, Nova Scotia, beginning at 10:00 A.M. on August 6, 1956, and continuing thereafter until finally completed, it being understood that the hearing examiner may be present during the taking of said deposition; with the right to address appropriate questions to the witness, to observe his demeanor in testifying, and to take such observation into account in determining the credibility of the witness.

/s/ John Lewis, Hearing Examiner,
July 9, 1956.

[fol. 12] BEFORE THE FEDERAL TRADE COMMISSION

Docket No. 6484

In the Matter of HENRY BROCH & Co.

Excerpts from Testimony for the Commission

Room 1310, 226 West Jackson Boulevard,
Chicago, Illinois,
May 8, 1956.

Met, pursuant to notice, at 10:30 a.m.

Before:

John Lewis, Hearing Examiner.

APPEARANCES:

Edward S. Ragsdale, Attorney for the Federal Trade Commission.

Harold Orlinsky and Fred Herzog, Attorney for the respondent Henry Broch & Co., (11 S. LaSalle Street, Chicago, Illinois.)

HENRY BROCH was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination

By Mr. Ragsdale:

Q. What is your understanding as to Canada Foods of Kentville, Nova Scotia, as to the amount of brokerage they would pay your firm for selling apple concentrate?

Mr. Orlinsky: Objection as to when that understanding took place.

Hearing Examiner Lewis: Yes; do that.

By Mr. Ragsdale:

Q. At the time you furnished this document or before [fol. 13] that time to Mr. Carmichael.

A. Well, I can't answer the question the way you phrase it. I will tell you why: Because each deal is subject to confirmation and subject to all terms which the seller imposes which might be a different brokerage. At the time we negotiated for Smucker—

Q. I am not talking about Smucker.

A. All right. The brokerage was not firmly established.

Hearing Examiner Lewis: Let me ask you this: Do you represent Canada Foods, Ltd.?

The Witness: Correct.

Hearing Examiner Lewis: As a broker?

The Witness: Yes.

Hearing Examiner Lewis: How long have you represented them?

The Witness: I think since 1954.

Hearing Examiner Lewis: What was the date of the first transaction?

The Witness: Well, I would have to check the records to refresh my recollection.

Hearing Examiner Lewis: Was it October, 1954?

The Witness: I don't know; I have to check my records.

Hearing Examiner Lewis: Check your records; it was quite a while ago?

The Witness: We probably had negotiations or discussions before, considerably before.

Hearing Examiner Lewis: Are you familiar with the transactions involved in the complaint in this case?

The Witness: Yes.

Hearing Examiner Lewis: Was that the first transaction you had?

The Witness: No.

Hearing Examiner Lewis: Did you have others prior to that time?

The Witness: We had others prior to that time.

[fol. 14] Hearing Examiner Lewis: Did you have any understanding with that company with regard to what brokerage it would be, or as a brokerage, what commission?

The Witness: As I said, every deal is subject to confirmation. It also includes the brokerage.

Hearing Examiner Lewis: Did you have any general understanding with them as to what your fee, in fact, would be, whether it would be any particular percentage?

The Witness: We discussed 5 percent. They wanted to pay less but we insisted on 5 percent.

By Mr. Ragsdale:

Q. Mr. Broch, I will hand you Commission's Exhibits 1-A, 1-B, 1-C and 1-D for identification, and I will ask you whether or not the information contained on that document was furnished by you to Mr. Carmichael at the time he made an investigation?

A. Well, let me see; it appears that is so but I can't recall exactly. I don't know whether I gave the information to Mr. Carmichael or whether Mr. Carmichael derived the information from my files.

By Mr. Ragsdale:

Q. Is the information correct?

A. I understand it is correct.

Hearing Examiner Lewis: Objection overruled. Commission's Exhibits 2 through 17 will be received.

(The papers referred to, heretofore marked Commission's Exhibits 2-A, 2-B, 2-C, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16-A, 16-B and 17, were received in evidence.)

By Mr. Ragsdale:

Q. Mr. Broch, I call your attention to Commission's Exhibits 16-A and 16-B; does that represent sales which you made as broker for Canada Foods to these various customers shown in the third paragraph, and does it show the amount of brokerage you received for making such sales? [fol. 15] A. Yes.

Q. That is true of Commission's Exhibits 16-A and 16-B?

A. That is right.

Q. Mr. Broch, I call your attention to Commission's Exhibit 17 and I ask you if that is a record of brokerage statements from Canada Foods, Ltd., showing the payment of brokerage fees to Henry Broch & Co. on the sale of 200 drums of apple cider to The J. M. Smucker Co. on May 1, 1955?

A. It looks that way, yes. I would say it is. Yes, it is.

EUGENE CARMICHAEL was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination

By Mr. Ragsdale:

Q. What is your business or occupation?

A. I am the assistant manager of the Chicago branch office of the Federal Trade Commission.

Hearing Examiner Lewis: Is there any dispute that Mr. Carmichael called at the office of Henry Broch & Co.?

Mr. Ragsdale: There may be some question, some dispute about the statements that Mr. Carmichael may later make and I am trying to show he is a man of good recollection.

By Mr. Ragsdale:

Q. Did Mr. Broch on this visit advise you as to the general nature of his business?

A. Yes, he did.

Q. What is the nature of Henry Broch & Co.'s business?

A. He described it as being a broker representing suppliers principally in the frozen vegetable and frozen fruit field, although he also does represent at least one supplier whose product is frozen rabbits.

[fol. 16] He stated to me that he represented some 25 or more suppliers located throughout the country; two actually with their locations not in this country, well, three, to be exact; that he himself conducts much of the business with contacts with customers after the original contact is being handled in large amount over the telephone.

During my last two visits with him which were on two successive days, he cooperated to the best of his ability but was occupied on the telephone much of the time because of suppliers and customers calling him and he calling such persons.

He also furnished me with the approximate annual sales of Henry Broch & Co., which he stated amounted to about \$6 million a year.

Q. Did he state whether or not they were one of the largest, or the largest?

A. Yes, he stated that his company was one of the larger brokers in the frozen food field.

Q. Without referring to any particular seller, will you tell us just briefly what was the general nature, how you conducted your investigation; what did you ask for?

A. Well, I asked early for a list of the suppliers represented by Henry Broch & Co., with their addresses, the commodity involved, and the rate of brokerage received by Henry Broch & Co. from such suppliers, because I wanted the list for use in selecting the right correspondence and invoice files, for example.

Q. Who furnished you the list, or was it furnished to you?

A. The list was furnished to me under the direction of Mr. Broch.

Q. Mr. Henry Broch?

A. Mr. Henry Broch, who had someone in the office prepare it.

Hearing Examiner Lewis: 1-A through 1-D is a duplicate of the document you received from Mr. Broch's office, is that correct?

The Witness: Yes, that is true.

By Mr. Ragsdale:

Q. And that document was prepared under the direction [fol. 17] of Mr. Henry Broch?

A. Yes.

Q. In the course of your investigation did you get down to making an investigation of Henry Broch & Co.'s sales of apple concentrate or apple cider for the Canada Foods Company?

A. Yes, I did.

Q. Would you relate in detail just what you found as a result of your investigation and just what statements Mr. Broch made to you concerning his methods of sales of that vendor's products?

A. Well, the statements he made to me and the records examined by me disclosed that Henry Broch & Co. had represented Canada Foods of Kentville, Nova Scotia, throughout most of 1954, and were continuing to represent them as brokers in this country, not as exclusive brokers, merely one of the brokers; that the normal rate of brokerage was five percent.

I observed various transactions and had copies made of some where the brokerage made on sales for this supplier was at the rate of five percent.

I then came to the question of a sale on October 27, 1954 of apple concentrate, 500 steel drums to The J. M. Smucker Co., Orrville, Ohio, at a price of \$1.25 f.o.b. New York, such concentrate being the product of the Canada Foods, Ltd., shipped from Kentville, Nova Scotia to New York harbor.

The documents and the discussion with Mr. Broch disclosed that the \$1.25 price of the sale to the J. M. Smucker Co. was five cents per gallon below the established f.o.b. New York price of Canada Foods, Ltd., which was \$1.30 per gallon in steel drums.

The \$1.30 price as the normal price at that time both before and after the October 27, 1954 transaction was acknowledged to me by Mr. Broch and I obtained from him two price lists from Canada Foods, Ltd., one dated some

two weeks before October 27, 1954 and the other dated approximately a month afterwards, in which the price f.o.b. New York for apple concentrate from Canada Foods was \$1.30 per gallon in steel drums.

Mr. Orlinsky: I object to any testimony as to price lists because the prices themselves are the best evidence.

[fol. 18] Hearing Examiner Lewis: I will not make any finding based upon the testimony of the witness with respect to any price list unless the price list is in evidence.

However, the testimony will be permitted to stand as the occasion for questions that the witness may have put to Mr. Broch, and Mr. Broch's responses thereto; the responses may and may not be in the nature of admissions.

The Witness: The October 27, 1954 sale of 500 steel drums of apple concentrate to The J. M. Smucker Co. at \$1.25 per gallon was discussed fully between Mr. Broch and myself and he related how it came to pass that Smucker was sold at \$1.25 on that transaction.

He stated that the J. M. Smucker Co. was among the only two or three consumers in the country who ever would or could take apple concentrate in such a large amount, that he has ascertained that the J. M. Smucker Co. was in the market for 500 steel drums of the concentrate, and that he had been informed very definitely by the purchasing agent for Smucker, that Smucker was being offered apple concentrate of comparable quality to any of Canada Foods, Ltd. at a price of \$1.25 f.o.b. New York, in steel drums, and that Smucker absolutely would go no higher than \$1.25. Mr. Broch continued to relate that faced with this situation, he talked with one of the principal officers by telephone.

By Mr. Ragsdale:

Q. Is that Mr. Koldinsky?

A. I don't have an independent recollection of his name so I can't testify to it. It was an odd name, but it was the name of one of the principal officials of Canada Foods of Kentville, Nova Scotia.

Mr. Broch stated that the discussions went back and forth over the telephone from Chicago to Kentville with Canada Foods, Ltd., maintaining that it could not come down to

\$1.25 and with Mr. Broch maintaining that it was impossible to obtain the sale at a price higher than \$1.25.

Mr. Broch told me that as a result of such telephonic conversations back and forth, it was finally agreed between his company and Canada Foods, Ltd. that if Henry Broch [fol. 19] & Co. would take only 3 percent brokerage on this particular sale, Canada Foods itself would lower its price enough so that the sale could be consummated to The J. M. Smucker Co. at a price of \$1.25 per gallon f.o.b. New York, in steel drums.

Q. Did you ascertain whether or not that was done, whether or not the merchandise was sold to Smucker at \$1.25 per gallon?

A. I did and I obtained a copy of the contract of sale as well as subsequent invoices since the shipments were made piecemeal over several months, actually.

Q. Did you ascertain whether or not Broch received only 3 percent on these transactions?

A. I did.

Q. Did you ascertain whether or not on all the other transactions that he had had with Canada Foods he received five percent?

A. I did.

Q. Was there any discussion about whether or not Henry Broch & Co. had directly or indirectly passed on brokerage to Smucker between you and Mr. Broch?

A. There was.

Q. Will you relate in detail what you recall of that conversation?

A. Mr. Broch felt that there was no violation of Section 2(c) of the amended Clayton Act because his company had not passed on any brokerage whatever directly to the J. M. Smucker Co. He conceived that violation of the section entailed a broker splitting his commission with a customer or passing something on directly to the customer.

I then raised with him the argument of whether in view of what he had told me, as I have just related, his company had not indirectly passed on 2 percent of the brokerage to the J. M. Smucker Co. by a round about method, i. e., through Canada Foods, Ltd. at Kentville, the arrangement which resulted in Henry Broch & Co. giving up 2 percent of its brokerage and Canada Foods lowering its price and

added together, reducing the price to Smucker by 5 cents a gallon.

Mr. Broch volunteered he saw the merit of my argument but that it had been his understanding previously that to violate Section 2(c) there had to be a direct passing on and he was violently against such a practice which he complained existed too widely in the industry.

[fol. 20] I do not believe Mr. Broch felt he was morally or legally guilty at all in this particular transaction with Smucker. I believe he thought he was acting entirely within the so-called Robinson-Patman Act.

Q. Did your investigation disclose that there were two specific contracts entered into by Broch with Smucker and that various shipments were made over a period of at least six months on these two contracts?

A. Yes.

By Mr. Ragsdale:

Q. Mr. Carmichael I want to go back to one thing, when Mr. Smucker advised you he had got in touch with Canada Foods about this price, did he state how the argument went between him and the representative of Canada Foods, he wanting the price down to \$1.25 and Canada Foods wanting to maintain it at \$1.30?

Hearing Examiner Lewis: He already told us the man up at Canada Foods wouldn't recede from the \$1.30. You covered that, didn't you?

The Witness: It is not true that he wouldn't recede at all from \$1.30. He said he would not come down to \$1.25 on his own for his company.

By Mr. Ragsdale:

Q. Did Mr. Broch make any other statements to you that you recall concerning this particular series of transactions?

A. I think that just about covers it. I can't think on my own of any additional statements. If you have any questions I can answer them Yes or No.

Q. But you don't recall any other things?

A. Nothing that wouldn't be repetitious.

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Cross-examination

By Mr. Orlinsky:

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Q. And besides the transaction at issue you also went into all the other transactions with Henry Broch, is that correct?

A. Not all of them, of course, but I made what I considered to be a thorough spot check of his transactions with most of the other 25 suppliers.

Q. And with reference to the 25 suppliers did you ascertain whether or not Mr. Broch operates on a fixed commission?

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The Witness: * * * A. First of all, I had the list he had furnished me showing the names of the suppliers and the commission they paid. I worked in the files from that list. In observing the different invoices and brokerage receipt statements it appeared that throughout the year of 1954 that I was examining, that there was no violation that I could observe in the case of the different suppliers I examined, that the first brokerage rate as was stated in the list as to each supplier was what showed up in the records except as to the one customer, Smucker.

Hearing Examiner Lewis: The percentage of commission was not the same with respect to each and every seller?

The Witness: No.

Hearing Examiner Lewis: But in the case of any particular percentage it was the same with that particular supplier?

The Witness: That is right. It varied considerably between different suppliers but remained steady with regard to any one supplier.

By Mr. Orlinsky:

Q. With reference to the list furnished you with the 25 suppliers' names thereon, was any supplier's name mentioned as to a range of commission rather than a fixed commission?

A. Not that I recall unless you have reference to the Burelson situation which involves a brokerage arrangement with a West Coast broker which Henry Broch has.

Q. Did you go into the transactions as to brokerage and sales with the Bauer and Loewy Company in New York?

A. I can't recall which transactions I took up but I do recall I made up most of them. I thought I had made an adequate investigation.

Q. I refer now to Complainant's Exhibit 1 which is in evidence and particularly to the account listed thereon of Bauer and Loewy Trading Corporation, and ask you what is the brokerage listed there?

[fol. 22] A. The brokerage as reported here is 1 percent to 3 percent, according to volume and selling price of product.

Q. Did you ask him to give the list of all suppliers or did you ask him which ones you wanted?

A. The major suppliers his company represented regularly.

Q. With reference to the subsequent conference you had with Mr. Broch regarding the normal rate of brokerage, I believe you testified there was conversation as to that, that the normal rate of brokerage was 5 percent?

A. Are you speaking of Canada Foods?

Q. No, I am speaking generally.

A. No, I did not testify to the normal rate of brokerage as to all suppliers represented by Henry Broch & Co. It varies anywhere from 5½ percent down to 2 percent, or even 1 percent, according to this last supplier you have just pointed out.

Q. With reference to the Canada Foods can you remember exactly what they were with reference to the normal rate of brokerage, exactly what you said to Mr. Broch or what he said to you as to Canada Foods?

A. Mr. Broch frankly admitted the normal rate of brokerage was 5 percent which rate appeared on the list in connection with Canada Foods.

Q. Did he use the word normal?

A. Well, regular or customary; he certainly used an expression conveying that meaning. I don't recall the exact words.

Q. Did you use the word normal in your discussion of the situation?

A. I don't recall whether I used the word normal, customary or regular, or simply asked what brokerage do you receive in connection with Canada Foods products.

Q. Did you examine all the transactions with respect to Canada Foods?

A. I feel I probably did examine all of them because I examined a large number of them.

Q. Did you become familiar with the size of the various orders?

A. Yes, I did, roughly.

[fol. 23] Q. Were there any other orders approximating 500 drums?

A. I don't believe so.

Q. Do you recall what the next largest order was?

A. I don't recall definitely. I know I obtained invoices which would show the size of such representative orders. Perhaps those invoices are already in evidence.

Q. And would you have a recollection, was there any in the neighborhood of 400 drums?

A. I don't think that high.

Q. Any in the neighborhood of 300 drums?

A. I don't think so.

By Mr. Orlinsky:

Q. Did you also not only look into the orders delivered but also at contracts between the companies, the sales contracts?

A. Yes, the contract actually is the principal document. It is the order. It is the transaction and is termed a contract by Henry Broch & Co.

Q. Were there any sales contracts for 500 steel drums other than the one with Smucker?

A. I saw none.

Q. And were there any sales contracts for 200 drums or 300 drums?

A. I believe I saw one for 200. It is possible that one of the invoices already admitted in evidence will show one of 200 drums.

Q. But most of them were under 200, most of the sales contracts?

A. I don't recall exactly but I have stated that 500 was an unusually large order and was the only such order.

Q. Now, you stated that Mr. Broch told you that he had ascertained from Smucker's purchasing agent that he had been offered apple concentrate of a similar quality for \$1.25 a gallon. Did you mean that they had been offered that by the Canada Foods or by some other producer?

A. The source of the offer was not made known to me, nor am I sure that Mr. Broch indicated to Canada Foods any knowledge he had as to the source of the offer, but the offer was current with J. M. Smucker Co. and the problem had to be tackled immediately.

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By Mr. Orlinsky:

Q. In the course of your conversation with Mr. Broch, [fol. 24] did Mr. Broch at any time tell you that he had requested Canada Foods to lower the rate of commission?

A. I certainly don't recall his having said that. Will you repeat that question, so I am sure what it is?

(Question read.)

A. (continued) I can testify that Mr. Broch did not. I certainly would recall it if he had.

By Mr. Orlinsky:

Q. In the examination of Mr. Broch's books and records, would you say they were in good order?

A. Yes, they were.

Q. And did Mr. Broch show you everything that you wanted to see in the course of your investigation?

A. Everything.

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(The letter dated September 29, 1954, heretofore marked for identification Commission's Exhibit No. 34, was received in evidence.)

Mr. Ragsdale: I have no further questions of Mr. Phipps.

Hearing Examiner Lewis: Do you have any extensive cross-examination?

We will take a recess.

(A short recess was taken)

Hearing Examiner Lewis: Hearing will be in order.

Cross-examination

By Mr. Orlinsky:

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Q. Now, outside of the business you did with M. W. Graves of Nova Scotia, the predecessor to Canada Foods, some five years previous, and the negotiations that you started with Canada Foods in September of 1954, you did no business with Canada Foods. Is that correct?

A. That is correct.

Q. Did you place any other orders with Canada Foods outside of the—strike that.

Did you place any orders with Canada Foods subsequent to September 29, 1954?

A. No.

Q. Your principal negotiations, I take it, were concerning this transaction with Smucker?

A. That is correct.

[fol. 38] Hearing Examiner Lewis: You never sold any of this concentrate for Canada Foods?

The Witness: Not until 1954.

By Mr. Orlinsky:

Q. I am referring to since September 29, 1954.

A. Prior to that?

Q. No subsequent.

A. Oh, yes.

Q. You did sell for other purchasers, other than Smucker?

A. That is right.

Redirect examination

By Mr. Ragsdale:

Q. Mr. Carmichael, do you recall who made the request when Mr. Broch and the official of Canada Foods were discussing cutting the price from \$1.30 a gallon to \$1.25; do you recall who made the request that Broch give up 2 percent or concede 2 percent of its brokerage?

Mr. Orlinsky: Just a minute; counsel is asking him to recall. All he knows is his conversation with Mr. Broch.

Hearing Examiner Lewis: That is what the witness is to answer, in making his answer, what was related to him if anything by Mr. Broch in that connection. He wasn't present at the telephone conference between Broch and Canada Foods.

Mr. Ragsdale: What Mr. Broch stated to him, I mean.

By Mr. Ragsdale:

Q. Do you recall from whom the request or agreement—

Hearing Examiner Lewis: Did Mr. Broch tell you in your conversation with him who made this request that the commission be lowered 2 percent?

The Witness: I do not have an independent recollection that Mr. Broch stated to me that either he took the initiative in that regard or Canada Foods offered the suggestion first, but I do recall definitely that Mr. Broch told me that as a result of these telephone conversations back and forth it was agreed between Henry Broch & Co. and Canada Foods, Ltd. that Henry Broch & Co. would take only 3 percent commission on that transaction and that as part of Canada Foods, Ltd.'s part of the bargain it would reduce its price so that in all the price would be lowered to \$1.25 per gallon for the sale to The J. M. Smucker Co.

Recross-examination

By Mr. Orlinsky:

Q. Mr. Carmichael, do you recall whether this agreement Henry Broch stated he had finally reached with

Q. How many purchasers did you sell for with reference to Canada Food products?

A. I can't tell you without checking the records.

Q. Do you have any idea?

The Witness: I would say possibly a half dozen.

By Mr. Orlinsky:

Q. What size purchases would that be, with reference to quantity?

A. I think 300 barrels would be one buyer and several orders for lots of 5,200 gallons.

Hearing Examiner Lewis: The biggest order you had was for 300 barrels?

The Witness: Yes.

By Mr. Orlinsky:

Q. Do you know what the 300 barrels went for?

A. \$1.30.

Hearing Examiner Lewis: How about the other barrels?

The Witness: All \$1.30.

By Mr. Orlinsky:

Q. Now, you were to receive, according to an agreement, 4% commission for your sales for Canada Foods?

A. That is right.

Q. Do you know how many brokers in this country sell for Canada Foods?

A. I do not.

Q. Does Canada Foods have any exclusive brokers in this country?

A. I wouldn't know.

[fol. 39] Q. Do you know whether or not the brokerage Canada Foods pays to various brokers varies?

A. Only from hearsay.

Q. Would there be any reason why Canada Foods would pay you 4% and another broker 5%?

A. Well, I wouldn't know, except about my own business.

Canada Foods was to the effect that the 3 percent commission was to be only his sales to Smucker or whether it would be 3 percent for all sales of 500 drums?

A. It just had to do with sales to Smucker. The question of quantity was not raised by Mr. Broch. Maybe he forgot to raise it while he was talking with me but it was not put on that basis while he talked with me.

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A. J. Purrs was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination

By Mr. Ragsdale:

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Q. Mr. Phipps, will you state whether you are here in response to a subpoena, which required your presence and the production of certain specified records?

A. That is my understanding of it.

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Q. Over what period of time have you been associated with or affiliated with the firm of Tenser & Phipps?

A. Since September 1, 1916.

Q. Does Tenser & Phipps represent, as brokers, a number of sellers of various types of food products?

A. That is correct.

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Q. How is your firm generally advised by your various principals of the prices that they desire you to sell their products at?

A. Well, it can be by wire or letter, or telephone. In our particular end of the business, it is mostly telephone [fol. 26] because it is bulk business and we have to find out a good deal other than the price.

Q. Do you on occasions also get regular mimeographed or multigraphed, or printed price lists from the sellers?

A. Not always.

Q. But you do on occasions?

A. Oh yes, particularly the items going to the grocery trade.

Q. Does the firm of Tenser & Phipps represent, as a broker, a seller by the name of Canada Foods, Ltd., of Kentville, Nova Scotia?

A. Yes.

Q. What particular type of food products does Canada Foods, Ltd., sell?

A. They are processors of fruit. In our representing them, it is mostly on concentrated apple juice, as well as straight pack apple juice, which comes in a can.

Q. Over what period of time has Tenser & Phipps represented Canada Foods, approximately?

A. Early in—Somewhere around August 1954 was about the starting of our business with Canada Foods.

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The Witness: * * * I do want to change that date of August 1st. I would like to have that made about September 1st.

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By Mr. Ragsdale:

Q. Did you, as broker or sales agent for Canada Foods, solicit business with them during October of 1954 on apple concentrate?

A. Yes.

Q. Do you recall whose business you solicited?

A. Among others was the J. M. Smucker Company at Orrville, Ohio.

Q. Do you recall approximately when you first solicited this business of J. M. Smucker Company?

A. We sell apple concentrate to Smucker for a great many accounts. On this particular deal, why, I think the Smucker business was entirely in October.

Q. Of 1954?

A. Right.

Q. Who do you call on or talk to over the phone in endeavoring to sell to Smucker?

A. Mr. H. W. Kieffer, K-I-E-F-F-E-R. He is the purchasing agent.

[fol 27] Q. Purchasing Agent for Smucker?

A. Yes.

Q. In connection with securing this business, did you make any personal visits to Orrville or submit samples, or anything of that kind?

A. Yes, we requested samples sent to us by Canadian Foods and I think they sent them about the 2nd of October. We re-sent them to Smucker about the 15th of October.

Q. Did Smucker do anything with the samples?

A. Yes, they put them through the laboratory to see if the quality of this concentrate suited their picture.

Q. Did it suit their picture?

A. It did, and we got a very favorable report on it from the laboratory.

Q. Were you able—what price did you quote them?

A. \$1.30 per gallon.

Q. Was that the price of Canada Foods at that time?

A. Yes. Oh no, yes, that was Canada Foods' price.

Hearing Examiner Lewis: What is the basis of your answer that that was the price, \$1.30?

The Witness: That was the price that Canadian Foods gave us to sell this apple concentrate in.

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(The telegram, dated October 11th bearing the heading C.N.T. Kentville NS, was marked Commission's Exhibit No. 20 for identification.)

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Hearing Examiner Lewis: That is the telegram quoting the prices at which you were authorized to sell the apple concentrate?

The Witness: That is right.

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Hearing Examiner Lewis: Commission's Exhibit No. 21 for identification will be received in evidence with the understanding that the only portion thereof that will be considered relevant by the Examiner is the second paragraph beginning with the words "On apple concentrate, \$1.35 per U.S. Gallon from New York Dock, etc."

[fol. 28] (The letter dated October 11, 1954, heretofore marked for identification Commission's Exhibit No. 21, was received in evidence.)

Hearing Examiner Lewis: Is it your testimony that the telegram, which is Commission's Exhibit No. 20, had not yet been received by you at the time you wrote the letter, which is Commission's Exhibit No. 21?

The Witness: That is right.

Hearing Examiner Lewis: Reporter is directed to mark for identification as Commission's Exhibit No. 22 a document on the stationery of Canada Foods Limited bearing the date October 13, 1954, reference, apple concentrate. Apparently it is not addressed to any particular individual. It is signed L. Koldinsky.

This name up here in writing "A. J. Phipps." Do you know where that came from?

The Witness: I think probably I got it from Canada Foods and sent it to Mr. Kieffer.

Mr. Kieffer: May I interrupt? I believe that is my writing there. I made that identification on the document.

By Mr. Ragsdale:

Q. Mr. Phipps, would you examine Commission's Exhibit No. 24 and state whether or not that document was mailed to J. M. Smucker Company?

A. It was mailed to them October 14th.

(The letter dated October 15, 1954, was marked Commission's Exhibit No. 25 for identification.)

Mr. Orlinsky: Alright.

By Mr. Ragsdale:

Q. Mr. Phipps, was this letter mailed by your firm to J. M. Smucker?

A. Yes, on October 15th.

By Mr. Ragsdale:

Q. Do you recall your conversation with Mr. Koldinsky [fol 29] where he advised you about a subsidized deal with the Canadian Government?

A. Yes. In other words, there was a subsidy on Canadian apples, and had there not been, they wouldn't have been able to make the price of \$1.30 a gallon. As soon as that quantity in the subsidy was used up, the price would advance to beyond our domestic price.

Q. Did Mr. Koldinsky know that you were anticipating securing an order of some concentrate from J. M. Smucker or that you were working on it?

A. Oh, yes.

Q. Did you know that the order would be for a sizeable quantity?

A. Yes.

Hearing Examiner Lewis: How did you know that?

The Witness: Well, I have sold these people before, and I think Mr. Kieffer probably told me he was interested in 500 barrels.

Hearing Examiner Lewis: Do you recall the subject of 500 barrels being mentioned?

Mr. Ragsdale: Yes, he has it later on.

Mr. Orlinsky: Later on, wouldn't be valid as it refers to the time of this letter.

Hearing Examiner Lewis: Do you have an independent recollection of 500 barrels being the figures mentioned at the time of these letters?

The Witness: I knew all the time it was 500 barrels. I don't know just when the first conversation was about the 500 barrels, but we have sold these people concentrate for a good many years and we know approximately what they will buy.

Hearing Examiner Lewis: What do they usually buy, a fixed number like that?

The Witness: If the price is right they do. If it isn't they stay away from it until it is.

Mr. Ragsdale: Later on, the 500—probably the next telegram.

The Witness: Pinning it down to 500 barrels exactly, that was given me by Mr. Kieffer at Orrville, Ohio, the quantity they would buy at that time.

[fol. 30] Hearing Examiner Lewis: Let me ask you this question. I notice this letter, which is Commission's Exhibit 26A and B in evidence, bearing the date October 19th, refers to a phone call you had with Smucker to give him detailed information which you had received from Koldinsky. I believe you testified that you had received that information from Koldinsky via a telephone conversation.

The Witness: That is right.

Hearing Examiner Lewis: Now, I notice that a letter, which is Commission's Exhibit No. 27, the following day, dated October 20th, refers to a very pleasant visit yesterday from Mr. Koldinsky which would indicate that Mr. Koldinsky had visited with you on the 19th.

The Witness: That is correct.

Hearing Examiner Lewis: Well, is it your testimony then that you talked to him in person on the 19th?

The Witness: Yes: If that is the date. Yes. He was here on the 19th of October in my office.

Hearing Examiner Lewis: I am just wondering whether you had some contact with him at the time you wrote the letter of October 19th?

The Witness: Yes, I had both a telephone conversation with him and by letter.

Hearing Examiner Lewis: ~~Well~~, the last letter that we have from him is—

The Witness: He just gave me the assurances that there would be no lower prices made—

Mr. Ragsdale: I offer in evidence Commission's Exhibit 28A and B as identified by the witness.

Mr. Orlinsky: No objection.

Hearing Examiner Lewis: Let it be received.

[fol. 31] (The letter dated October 25, 1954, heretofore marked for identification Commission's Exhibit No. 28A and B, was received in evidence.)

(The telegram dated October 26, 1954, was marked Commission's Exhibit No. 29 for identification.)

Hearing Examiner Lewis: What was the occasion of its being sent?

The Witness: Because Smucker could have offered us a trade on concentrate at \$1.25. Our price was \$1.30.

By Mr. Ragsdale:

Q. Was the offer made to you personally at Orrville or by phone?

A. At Orrville.

Hearing Examiner Lewis: Apparently you had first visited Orrville and Smucker had indicated to you that they didn't want to pay more than \$1.25.

The Witness: That is what they were willing to pay.

Hearing Examiner Lewis: Was there any discussion of quantity at that time?

The Witness: Yes, it is right there.

By Mr. Ragsdale:

Q. Did you receive an answer from Canada Foods?

A. By phone the next morning.

Q. Did they accept or reject your offer?

Hearing Examiner Lewis: Whom did you talk to?

The Witness: Koldinsky.

Hearing Examiner Lewis: What was the conversation?

The Witness: I told him I had this offer of \$1.25 for 500 barrels from Smucker which was to be like samples submitted which was OK. He said they simply would not and could not make any price under \$1.30 per gallon. It was at that time he said if it weren't for the subsidy [fol. 32] they wouldn't be able to make a price like that, and just as soon as the quantity of apples they were working on ran out, their price would be even higher than the domestic price. But he positively assured me it would be nothing under \$1.30. He assured me he could only make the price because of the subsidy.

By Mr. Ragsdale:

Q. Did he make any statement to you with reference to how you could lower the price?

A. He said they couldn't lower the price unless the brokerage was cut to lower the price. His price was \$1.30 and that was it.

Hearing Examiner Lewis: What was said with reference to cutting the brokerage? Was there something said?

The Witness: Yes.

Hearing Examiner Lewis: Was there any indication of how much the brokerage should be cut or anything along that line?

The Witness: No. To meet the price it would have to be cut considerably, five cents a gallon.

Hearing Examiner Lewis: Did he indicate to you that if you were to cut your brokerage to some extent that he would meet it with a further cut in the price?

The Witness: No, he did not. Then again, as far as we are concerned, if we were to cut our brokerage, we only get 4% on the deal and if we had cut our brokerage, there wouldn't be anything left. He told me that--

Hearing Examiner Lewis: Did you tell him that?

The Witness: Yes and he told me that was it. Nobody could trade with him under \$1.30 unless of course the brokerage had been cut.

By Mr. Ragsdale:

Q. Did you transmit that information that Canada Foods would not sell at a price less than \$1.30 to J. M. Smucker?

A. Yes.

Q. How did you transmit that information?

A. By phone. The 27th, I think.

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[fol. 33] Q. Mr. Phipps, I hand you Commission's Exhibit No. 30, and I will ask you whether or not that document was mailed by you or your firm to J. M. Smucker Company?

A. Yes.

Q. Was it after the conversation you had with Mr. Kieffer in which you told him of the refusal of your client to sell at less than \$1.30?

A. That is right.

Mr. Ragsdale: I offer in evidence Commission's Exhibit No. 30 as identified by the witness.

Mr. Orlinsky: No objection.

Hearing Examiner Lewis: Let it be received.

(The letter dated October 27, 1954, heretofore marked for identification Commission's Exhibit 30, was received in evidence.)

Hearing Examiner Lewis: I notice in the first paragraph, you refer to your telephone conversation with Mr. Kieffer that day. Can you tell us about that telephone conversation? What you said to him and what he said to you?

The Witness: As near as I recall it, I tried to get the \$1.30 price from Mr. Kieffer instead of his offer of \$1.25.

Hearing Examiner Lewis: You related to him the fact that you had had the telephone conversation with Mr. Koldinsky and he would not recede from the \$1.30 price. Is that what happened?

The Witness: That is what happened.

Hearing Examiner Lewis: Anything else?

The Witness: Nothing.

Hearing Examiner Lewis: And you wrote a letter confirming it, is that it?

The Witness: That is right. Except I checked on it later, the next day, and asked Mr. Kieffer about the trade and he said he had already completed his deal. So that was it.

Hearing Examiner Lewis: The day following this letter you called Mr. Kieffer again?

The Witness: Yes. It could have been the same day as far as that goes.

[fol. 34] Hearing Examiner Lewis: You say this letter confirms your conversation with him?

The Witness: That is right.

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Hearing Examiner Lewis: How do you know the deal was completed?

The Witness: Mr. Kieffer phoned me he was covered, at the date he offered me, from the same shipper. It was around the time that—they offered it to me on the 26th and we declined it on the 27th. I think it was probably the 28th when we talked about it again and he told me he was covered.

Hearing Examiner Lewis: This letter here refers to the fact that you couldn't offer him a lower price. Was he supposed to get in touch with you again, or did this conclude the matter as far as you were concerned?

The Witness: As far as we were concerned, he and I, he offered me \$1.25, I couldn't get it, and he went and offered it to somebody else and they did. The same shipper. That was it.

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Hearing Examiner Lewis: No, that is the October 11th one we talked about previously.

Your letter of October 29th refers to the wire from Canada Foods to stop selling concentrate for one week.

The Witness: I don't have it. I know that that came in, though.

Hearing Examiner Lewis: Did it refer to the apple concentrate or something else?

The Witness: That is right. To the apple concentrate.

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Q. I call your attention to a paragraph in which you state, "All we want to know is your price quoted to other brokers was the same as that given to us".

Was that ever answered?

A. Yes, by phone. He said nobody had anything lower than \$1.30 price and wouldn't have. Wouldn't possibly have.

[fol. 35] Hearing Examiner Lewis: Was that phone conversation in response to this particular letter, or was it a phone conversation that you had with him on business generally?

The Witness: Well, it was just a telephone conversation pertaining to this particular deal, and there may have been some conversation there about some other customers for apple concentrate.

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Mr. Ragsdale: I offer in evidence Commission's Exhibit No. 31 as identified by the witness.

Mr. Orlinsky: No objection.

Hearing Examiner Lewis: Let it be received.

(The letter dated October 29, 1954, heretofore marked for identification Commission's Exhibit No. 31, was received in evidence.)

By Mr. Ragsdale:

Q. Did you on or about October 29th, either a few days before or a few days after, in a conversation with Mr. Koldinsky, ascertain from him the statement that if any one was selling apple concentrate at a price lower than \$1.30, they were giving up their brokerage or part of their brokerage?

A. That is correct.

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Q. Did you on or before October 29, 1954, have a telephone conversation with Mr. Koldinsky in which you asked him how a competitor had been able to sell Smucker at a lower price than you could quote?

A. No, I didn't.

Hearing Examiner Lewis: What if anything was said with reference to a competitor's getting in to the picture?

The Witness: Between Koldinsky and me?

Hearing Examiner Lewis: Yes.

The Witness: After he turned the offer down, that was it. We didn't ask him what—

Hearing Examiner Lewis: Did you ever have any conversation with him in which you told him that you understood that some competitor of yours had been able to get this business at a better price?

[fol. 36] The Witness: No, after the transaction was over—

Hearing Examiner Lewis: Well, before the transaction, or during the time that was pending.

The Witness: I offered him the \$1.25, and he wouldn't take it and said nobody could sell under \$1.30 and neither could we, unless they took the cut in brokerage price.

Hearing Examiner Lewis: When did you learn that a broker had been able to secure an offer to sell this at \$1.25? When did you find out for the first time?

The Witness: I found out from my customer that he had already traded at \$1.25 with the same shipper.

Hearing Examiner Lewis: Did you have any further conversation with Mr. Kieffer about that?

The Witness: No, there wasn't any use to have it. The transaction was over, and that was it.

By Mr. Ragsdale:

Q. Mr. Phipps, as I understand you, the price of \$1.30 a gallon was a definite fixed price to the trade by Canada Foods.

Mr. Orlinsky: I object to the form of questioning.

Hearing Examiner Lewis: Objection sustained.

That was the price quoted you?

The Witness: Yes.

Hearing Examiner Lewis: Do you have any knowledge beyond what was quoted to you?

The Witness: No.

Hearing Examiner Lewis: You never saw any other general price list, did you?

The Witness: No. This stuff isn't put out on a price list. It is mostly specialized price list. There is no use issuing 100 when you are just going to have one entry. It isn't customary to issue a price list on bulk concentrate.

By Mr. Ragsdale:

Q. What is your understanding with Canada Foods as [fol. 37] to the rate of brokerage a definite fixed amount, per apple, on your sales regardless of the quantity purchased?

A. Yes.

Hearing Examiner Lewis: When was that understanding had? I believe you previously stated that it was 4%.

The Witness: It is covered in a letter here, earlier, in a letter from Canada Foods.

Mr. Ragsdale: I offer in evidence Commission's Exhibit No. 34 as identified by the witness.

Mr. Orlinsky: No objection.

Hearing Examiner Lewis: Let it be received.

Q. Now, in the course of your business, you sell various types of products. Is that correct?

A. That is correct.

Q. The commission for the various products, I take it, is not always the same. Is that right?

A. Well, we represent people like Diamond Walnuts, Morton Salt and others. Those brokerages have always been the same regardless of the size of the order.

Q. Does the brokerage ever vary for the same product at all?

A. Oh, yes.

Q. What causes the variation of brokerage?

A. What causes it? I don't know, except the market condition at the time of sale.

Hearing Examiner Lewis: When you say the brokerage for the same product varies—

The Witness: Not the brokerage, I mean the same price.

By Mr. Orlinsky:

Q. Let's get this straight. For the same seller and for the same product the brokerage never varies?

A. No.

Q. That is regardless of market conditions?

A. Yes, regardless of market conditions. We don't set the brokerage. The principal does.

Q. Well, you say the principal sets the brokerage. Does the principal ever tell you your brokerage is going to be changed?

A. If he does, it is not acceptable to us as a general rule.

Q. But there are times when a seller tells you you will have to take less brokerage and sometimes it is acceptable?

A. No, it isn't acceptable to us.

Q. You said as a general rule. Is there exceptions to that?

Hearing Examiner Lewis: Have you ever had that situation occur in your business where the principal wanted less brokerage?

The Witness: It may have occurred. I don't recall that it has.

[fol. 40] Hearing Examiner Lewis: You have no recollection?

The Witness: After going through what we did with the O.P.A. and everything, we have one rule to go by, and that is it.

By Mr. Orlinsky:

Q. In other words, if a principal tells you you are going to have to take instead of 4%, 3%, you don't accept that?

Hearing Examiner Lewis: He said it has never come up. Is that your testimony?

The Witness: That is right.

Mr. Orlinsky: I understand he doesn't accept it.

Hearing Examiner Lewis: He said he has no recollection of its even coming up.

Mr. Orlinsky: May I try to clarify this?

Hearing Examiner Lewis: Go ahead.

By Mr. Orlinsky:

Q. Do you recall a situation where a principal has asked you to take less brokerage?

A. Yes.

Q. Do you recall a situation where you have accepted less brokerage than you operated on originally?

A. I can't recall it.

Q. In other words, if he won't pay the normal brokerage, you refuse to accept orders?

A. We are not allowed to do that.

By Mr. Orlinsky:

Q. Your answer is you don't accept a cut in brokerage?

A. That's right. The only way we can do that is to work with a broker in another market and split our commission with him.

Mr. Ragsdale: Sub-broker?

The Witness: Yes.

By Mr. Orlinsky:

Q. Mr. Phipps, I refer to the Commission's Exhibit No. 24 in evidence. That part of that Exhibit where you quote

a price of \$1.35 to Smucker. I believe you testified that the \$1.35 price that you quoted at that time was higher than the subsequent \$1.30 price, because at that time the price had not been set yet?

A. That's correct.

[fol. 41] Q. If it hadn't been set, how did you get the price of \$1.35?

A. Because the principal gave us. That is, the market hadn't righted itself and that was the spot market at the time the quotation was made.

Q. How was it given to you?

A. Oh, I wouldn't know, by telephone or telegram or letter.

Q. You have a letter in which you have a price showing \$1.35?

A. Yes, we should have it. We definitely quoted it to our customer.

Hearing Examiner Lewis: You would have it if you had received it in the form of a letter. You wouldn't if you received it in the form of a telephone call.

The Witness: We received it, I don't know how, whether in the form of a letter or telephone call or telegram. It's the seller's price.

By Mr. Orlinsky:

Q. Did you ever have any quoted prices from Canada Foods for more than \$1.35 a gallon?

A. Not on this 1954 market that I recall.

Q. Well, you actually didn't begin negotiations with Canada except prior to the 1954 market?

A. That's right—well, just ahead of the time that the final price was made. Early in the year, apple concentrate was very much higher than the prices we are talking about now.

Q. Prior to the telegram dated October 26, 1954, which is Commission's Exhibit No. 29, advising Canada Foods that you had an offer of \$1.25 a gallon for 500 drums, did you ever indicate to Canada Foods that you had an order for a quantity of 500 drums?

A. That's it, right there.

Q. Prior to October 26, was there ever any indication that you were asking for a price on 500 drums?

A. I can't just recall the quantity there. As a matter of fact, the only thing definite was after I received the offer and was told the quantity by the buyer.

Q. Now, you testify that sometime subsequent to the time that you sent this telegram of October 26, 1954, or rather a short time thereafter, you spoke to Mr. Koldinsky by phone?

A. That's correct.

Q. At that time, he told you that there couldn't be any lower price unless there was a cut in brokerage?

A. That's right.

Q. Who first broached the subject of cut in brokerage? [fol. 42] A. Mr. Koldinsky, his reason for not being able to accept my price.

Q. Did you ask him how much of a cut in brokerage?

A. No.

Q. When he mentioned cut in brokerage, what did you say, exactly?

A. I told him—he didn't ask me about a cut in brokerage. He said unless the brokerage was cut, no better price could be made or would be made.

Q. What was your answer to that?

A. My answer was that my offer was \$1.25 and that was the best I could do and I had understood that price was available in other directions.

Q. You didn't ask him what cut in brokerage he had in mind?

A. No, because if we had cut our brokerage to take the order, we wouldn't have had anything left.

Q. Did you tell him that?

A. No.

Q. Did you at that time discuss the violation of any part of the Act?

A. No, not that I recall. It may be that we brought it up, but I don't recall. It was a telephone conversation.

Q. I refer now to Commission's Exhibit No. 30, which is a copy of a letter dated October 27, 1954, addressed to J. M. Smuckee, and I refer you particularly to the third paragraph, in which you say, "We could confirm the order at the price of \$1.25, but we are very much afraid that we would be right in the way of the Robinson-Patman Act and we would find our names in print. It would be a

feather in somebody's cap to decorate us with the violation, and further we do not believe that you are the kind of folks who would want to go along with a deal of this kind."

Whom did you mean by somebody? "It would be a feather in somebody's cap." Whom are you referring to?

A. Well, I don't know whom I am referring to. I know that if it was found out by any member of the National Brokerage Association that wanted to have a gripe, why, it could be anybody.

Q. You had no one in particular in mind when you wrote that?

A. No.

Q. You had various conversations with Mr. Kieffer of Smucker and Company. Did they advise you that they [fol. 43] were also dealing with another broker in this matter?

A. They didn't advise me that, that I recall. But, naturally, as a man knowing his business, he wouldn't pick one spot and stay there until he could find out what the real market was.

Q. Now, outside of this letter that you addressed to Mr. Kieffer, did you have any telephone or oral conversation with him regarding a violation of the Robinson-Patman Act?

A. I might have told him—I tell him in the letter here that if we wanted to sacrifice our brokerage we could take the order, but we were afraid to do it.

Q. It is your contention then, that if you had a cut in brokerage you would be violating the Robinson-Patman Act?

A. Yes.

Q. A short time after October 26, which is the day you sent this telegram we just referred to, you spoke to Mr. Koldinsky and he told you that he couldn't lower the price?

A. That's right.

Q. I believe you said you had no further conversations with him regarding that transaction?

A. That's correct, I think as near as I can recall it, except to write him and have him assure us that nobody would have a better price than we had.

Q. Was that the extent of your urge initially, to try to have him cut the price?

A. I don't understand that question.

Q. I mean outside of that—you didn't urge him any further to try to get him to cut the price?

A. No, he indicated the price and stood on it.

Q. You didn't point out that this was a comparatively large order in the trade?

A. No, but he was here a little prior to the time we are talking about and we discussed this particular account in detail. He knew what I was thinking about and I knew what he was thinking about.

Q. Would this be considered a large order, 500 drums?

A. Yes.

Q. Are there many purchasers in the country that would purchase 500 drums?

A. That, I don't know about, but I imagine there are a good many others. Not too many, but some.

The various types of trade buy a considerable volume of apple concentrate, but they don't happen to be numbered among my customers. All I know is that the biggest order we had here was about 300 barrels.

[fol. 44] Q. What was the next largest order?

A. I think 100 barrels. As far as that goes, it went all the way down to 10 barrels.

Q. All those orders were sold at a price of \$1.30 a gallon?

A. That's correct.

Q. Do you have any correspondence in your file at all with Canada Foods with reference to a variance in price from \$1.30?

A. Not without going in our files someplace. I just can't off hand point it out.

Q. Would you say that from the time you started dealing with Canada Foods which was sometime in September of 1954, down to, say, the present time, did you have any other quotations of price other than \$1.30 a gallon, for steel drums?

A. Since this \$1.30 price was made, no.

Q. Are you still doing business with Canada Foods?

A. We haven't been doing any for the time being. But on items of this type, this stuff isn't sold every day in the week.

Q. Well, all right, can you recall when the last time was you placed an order for Can da Foods' products?

A. I would say last fall. Just off hand, I haven't got the records in front of me but that is when it was.

Q. I refer again to Commission's Exhibit No. 30, which is this letter that I quoted from, addressed to Mr. Kieffer, in which you make reference to the fact that you would be afraid you would be in the way of the Robinson-Patman Act.

Did Mr. Kieffer ever respond to that letter?

A. Not that I recall.

Q. Did Mr. Kieffer ever ask you what you meant by the statement that you were afraid you would be in the way of the Robinson-Patman Act?

A. Not that I recall.

Q. It is your statement now, that as of October 27, 1954, you were unaware that some other broker was dealing with Smucker for Canada Foods?

A. I couldn't say I was unaware. It would be a normal position for the buyer to be trading with a half dozen brokers on business of that kind. I would normally suppose there was.

[fol. 45] Q. But you had no specific broker in mind?

A. No.

Q. When you made reference to the Robinson-Patman Act?

A. No.

Q. Do you know the Henry Broch and Company, respondents in this complaint?

A. I know of them. I know him when I see him.

Q. You know Mr. Henry Broch?

A. Yes, I know him.

Q. Have you had any conversation with Mr. Broch with reference to this particular transaction?

A. Never.

Q. You have never had a conversation with Mr. Broch?

A. Not that I recall.

Q. On October 27, 1954, you were not aware of the fact that Mr. Broch was trying also to sell Canada Foods to Smucker?

A. I would suppose he was, but I wouldn't know it.

Q. Why would you suppose?

A. Because he is trading in the same items I am.

Q. Do you know how long Mr. Broch has traded with Canada Foods?

A. I think probably about the same time we have represented them.

Q. Do you know what commissions were paid to Mr. Broch?

A. Only by hearsay.

Q. What do you know by hearsay?

A. I hear that Canada Foods pay him 5 per cent brokerage. But then again I don't know if there are any special services in there that he has an extra cost or not.

Q. Did you ever have a discussion with Mr. Kieffer of J. M. Smucker and Company or anyone else connected with J. M. Smucker Company with reference to purchasing the steel drums that the apple concentrate was to come in?

A. Did I have any conversation with him?

Q. Yes.

With reference to the purchase of the steel drums?

A. He specified what he wanted, the steel drums.

Q. There is something I would like to get clear. When this concentrate would come in the steel drums, would the purchaser have to return the steel drums?

A. Not necessarily.

[fol. 46] Hearing Examiner Lewis: Did the price include the steel drums?

The Witness: Yes.

Hearing Examiner Lewis: You mean \$1.30 a gallon included the steel drums?

The Witness: Yes.

Hearing Examiner Lewis: When you say not necessarily, he wouldn't have to return them, period?

The Witness: He may elect to sell them or use them.

Hearing Examiner Lewis: He wouldn't have to return them to the seller?

The Witness: Not up in that direction.

Hearing Examiner Lewis: They are his?

The Witness: Yes.

By Mr. Orlinsky:

Q. Did Mr. Koldinsky of Canada Foods ever discuss a proposition with you that if some arrangement could be

made for the return of the steel drums the price would be less?

A. Not that I recall.

Q. You had no conversation with relation to the return of the steel drums?

A. Not that I recall.

He said something about what the steel drums were worth up there, but that is all I recall about it.

Q. You didn't discuss the proposition of steel drums with Smucker and Company?

A. Yes, they told me what they wanted. Steel drums.

Q. You didn't discuss the return of them or any deal with Mr. Koldinsky regarding steel drums?

A. I probably told Mr. Kieffer what the steel drums were worth up in Canada and I had gotten that from Mr. Koldinsky.

Hearing Examiner Lewis: Was there any talk between you and Mr. Koldinsky which indicated that he would be willing to lower the price from \$1.30 provided the drums were returned?

The Witness: It never occurred to me that way. If he said it, I don't recall it. I think he told us what they were getting for steel drums up there.


[fol. 47] Hearing Examiner Lewis: Was that by way of indicating that that was part of his cost and he couldn't reduce the price?

The Witness: Probably.

Hearing Examiner Lewis: How is that?

The Witness: No, no, not Koldinsky. I was thinking about the customer.

The price we told him steel drums were bringing in Canada, compare that with what these people had and they would have a better deal by not returning these drums. It is more economical for them to handle the steel drums than the other packages, like five-gallon cans or wooden barrels.

By Mr. Orlinsky: 

Q. When you spoke to Mr. Koldinsky and he said he couldn't lower the price unless you took a cut commission—

A. He didn't put it that way, he said unless the brokerage was cut. He didn't say for me to cut it, but unless the brokerage was cut, there would be no lower price—couldn't be.

Q. The answer you gave him was that there couldn't be any lower brokerage because there would be nothing left?

A. I didn't discuss my brokerage with him at all.

Q. You didn't answer that part of it at all?

A. No.

Q. You didn't make any reference to a violation of law at that time?

A. Not that I recall.

Q. What did you understand him to mean by the statement, "Unless there would be less brokerage"?

A. I don't understand that.

Q. Did you understand him to mean that he wanted part of the brokerage kicked back to the purchaser?

A. No, his statement to me was that the \$1.30 price was the best and only price he had, was the only price he would have, and that nothing would cross his desk under \$1.30. The only way for him to get a better price than that was for the broker to cut his commission.

Q. But he made no mention of the broker returning anything to the purchaser, did he?

A. No.

[fol. 48] Q. Do you sell Apple Concentrate for other suppliers besides Canada Foods?

A. Yes.

Q. Are they domestic suppliers?

A. Yes.

Q. Do you sell apple concentrate for foreign suppliers?

A. Yes, from time to time we do.

Q. Where are those suppliers located?

A. Holland, France, Belgium.

Q. How does the price of the French suppliers, for example, compare with the price quoted by the Canada Foods?

A. Well, there was no lower price made than the \$1.30 price that I know anything about, unless it was distress lot.

Q. But so far as you know, on or about October 27, that was the lowest price that apple concentrate of the same quality could be obtained from any producer including —

A. As far as I am concerned, unless it was a distress lot, these foreign shippers consign stuff to the New York market. If they can't sell it at one price and it stays there a long while they sell it at another. The \$1.30 price was the only price I knew of on 1954 pack on good juice.

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H. W. KIEFFER, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Ragsdale:

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Q. Are you acquainted with the firm of Tenser & Phipps, and Mr. A. J. Phipps?

A. Yes, sir.

Q. Has there been any business relationship between this firm and J. M. Smucker?

In other words, do Tenser & Phipps sell you merchandise from time to time?

A. He represents certain principals we do business with.

Q. Over what approximate period of time has this brokerage firm solicited and secured business from J. M. Smucker Company?

A. I can't answer that accurately, but I know they have been soliciting business ever since I have been with the Smucker firm for 21 years. Probably quite a few years before that.

Q. As purchasing agent for J. M. Smucker, did it come to your attention that Tenser & Phipps represented Canada Foods, Limited?

A. Yes, sir.

Q. When did it come to your attention? In 1954?

A. I would say early in the fall of '54 was the first contact we had with Mr. Phipps in regard to Canada Foods.

Q. Did Mr. Phipps solicit your company's business in the latter part of October on apple concentrate for this seller?

A. Yes, sir.

Q. Did you offer him the business at a specified price?

A. Yes, sir.

Hearing Examiner Lewis: Was this contact that you had with Mr. Phipps all covered by correspondence, or were there oral discussions?

The Witness: There were many oral discussions, primarily over the phone.

By Mr. Ragsdale:

Q. Was Mr. Phipps able to secure the business for Canada Foods, his principal, at your prices?

A. No.

Q. Did he advise you that Canada Foods rejected your offer at \$1.25 per gallon?

A. Yes, sir.

Q. Did you thereafter place the business with another broker?

A. Yes, sir.

Q. With the other broker at a price of \$1.25, your price?

A. That's correct.

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Hearing Examiner Lewis: Mr. Kieffer, do you have any independent recollection as to whether the subject of the quantity of the order which you intended to place was discussed in your conversations with Mr. Phipps or anybody connected with his organization?

[fol. 50] The Witness: I am quite sure that we discussed the quantity that was involved.

Hearing Examiner Lewis: Do you recall when that was discussed for the first time?

The Witness: I would say early in October.

Hearing Examiner Lewis: Early in October?

The Witness: October of 1954.

Hearing Examiner Lewis: Do you recall who approached whom about this apple concentrate purchase?

The Witness: I think Mr. Phipps made the first approach to Smucker Company with regard to the purchase of Canada sales.

Hearing Examiner Lewis: I think you indicated an interest in purchasing some?

The Witness: That's correct.

Hearing Examiner Lewis: Was there any interest in the quantity you would purchase?

The Witness: Yes.

Hearing Examiner Lewis: What was that quantity?

The Witness: We indicated we were interested in a quantity in the neighborhood of 500 drums.

Cross-examination

By Mr. Orlinsky:

Q. Mr. Kieffer, you say the first time that you had discussion with Mr. Phipps concerning apple concentrate was sometime in October of '54. Is that correct?

A. In connection with this particular deal.

Q. You don't know the exact date? Just sometime in October?

A. Yes, sir, early in October.

Q. Had you been contacted by any other broker than Mr. Phipps concerning the purchase of apple concentrate from Canada Foods?

A. Yes, sir.

Q. Who was that?

A. Henry Broch and Company.

Q. That was prior to the time Mr. Phipps contacted you?

A. That was after the time Mr. Phipps contacted me.

[fol. 51] Q. How long after?

A. I would say a matter of less than a week.

Q. What was the means of contact? Was that by letter or did he come to see you or what? Did he telephone?

A. He telephoned.

Q. Did you indicate to Mr. Broch what your intentions were concerning the purchase of apple concentrate at that time?

A. We indicated the quantity we were interested in.

Q. Did you also indicate the price that you wanted to purchase it?

A. No, sir, I indicated that we had an offer of \$1.30 a gallon but I didn't indicate that we had set a definite price that we would pay of \$1.25 a gallon.

Hearing Examiner Lewis: Do I understand you correctly that at the time you were approached by Henry Broch you already had an offer through Mr. Phipps of \$1.30? You had a definite—

The Witness: That's correct.

Hearing Examiner Lewis: You had a definite commitment for \$1.30?

The Witness: That's correct.

Q. I take it Mr. Broch contacted you sometime subsequent to October 14?

A. That's right.

Q. By phone?

A. That's correct.

Q. Would you have an idea how many days after October 14?

A. I would say a matter of three or four days.

Q. And you told Mr. Broch that you already had an offer of \$1.30?

A. We had been offered the commodity at \$1.30 per gallon.

Q. What did Mr. Broch respond to this?

A. He asked me what quantity we were thinking about and I indicated that we were in the market to purchase a quantity in the neighborhood of 500 drums.

Q. Was there any further discussion with reference to the price?

A. Not in that conversation, but he came back in a matter of a day or two and indicated that the principal was willing to sell at \$1.25 per gallon.

[fol. 52] Q. Did you ever tell either Mr. Smucker or Mr. Phipps that \$1.25 was the most you would pay?

A. I am positive that I told Mr. Phipps that we were offered the commodity at \$1.25 and we saw no reason why we should pay \$1.30 for the same item.

I think that same conversation was conveyed to Mr. Paul Smucker, our general manager.

By Mr. Orlinsky:

Q. Do you recall receiving that letter from Mr. Phipps?

A. Yes, sir.

Q. That is a copy of the letter?

A. That's correct.

Q. Do you recall reading that letter?

A. Yes, sir.

Q. What were your reactions regarding the reference to the Robinson-Patman Act?

Hearing Examiner Lewis: If any.

The Witness: Well, I more or less disregarded it, because it was an out-of-the-country seller and I felt that we had played no part in trying to reduce the price. I consequently let it drop at that.

By Mr. Orlinsky:

Q. In other words, your reaction was that it was a question of price and not of brokerage?

A. That's correct.

Q. You had no knowledge of what brokerage Mr. Phipps was receiving?

A. No, sir.

Q. And no knowledge of what Mr. Broch was to receive?

A. No, sir.

Q. That was something of which you were not concerned?

A. That's correct.

Q. And you eventually placed the order through Henry Broch Company?

A. That's correct.

Q. For \$1.25 a gallon?

A. That's correct.

Q. That was for 500 steel drums?

A. Yes.

Q. Have the 500 steel drums been delivered?

A. Yes, sir.

Q. Was any money paid to you by Henry Broch—

[fol. 53] The Witness: No, sir.

Q. Did you have any agreement with Canada Foods with reference to the steel drums?

A. I don't—

Q. Was there any agreement whatsoever with reference to the return of the steel drums?

A. Not at the time of purchase.

Q. You have an agreement with him now?

A. Yes, sir, we do. On a shipment-to-shipment basis.

Q. You return the steel drums, is that correct?

A. We return the steel drums on a freight-collect basis and receive \$2.50 each.

Hearing Examiner Lewis: He pays the freight for it?

The Witness: He pays the freight from Orrville, Ohio to Nova Scotia and in turn pays us \$2.50 per empty drum for the ones in good condition.

Hearing Examiner Lewis: When was that arrangement first made?

The Witness: It had no relationship to the case being tried. It has been since that time, on all 1955 purchases.

Hearing Examiner Lewis: In other words, with reference to that purchase of '54 of 500 drums, that was not returned?

The Witness: That's correct.

Hearing Examiner Lewis: This is something that developed in '55?

The Witness: That's correct.

By Mr. Orlinsky:

Q. In October of 1954, did you purchase any apple concentrate from other producers other than Canada Foods?

A. Not that late in the year.

Q. Earlier in the year did you purchase any apple concentrate from other producers?

A. To the best of my recollection, we did.

Q. Do you recall what price?

A. As I recall, all that we purchased was of domestic manufacture and I would say that we paid somewhere in the neighborhood of \$1.40 to \$1.45 a gallon earlier in the year. That was before the new pack was coming on the market.

[fol. 54] Mr. Orlinsky: That is all, Mr. Examiner.

Redirect examination

By Mr. Ragsdale:

Q. Mr. Kieffer, I believe you testified you were offered the same product at \$1.25 per gallon prior to placing this order with Mr. Broch?

A. No.

Q. You had not been offered that product at \$1.25, the same apple concentrate.

Had any other seller other than Canada Foods offered you the same product at \$1.25 per gallon?

A. We had offerings off and on. We get numerous offerings from various people.

Q. But you don't know of any offerings of \$1.25 per gallon on or about the time of October 1954, that you placed the order with Mr. Broch?

A. Not of that same commodity. We had offerings of concentrate that was produced in France, Holland, Switzerland, Belgium, and other places, at prices competitive to the \$1.25 figure.

Q. As a matter of fact, you tested this Canada Foods apple concentrate, did you not, the sample Mr. Phipps sent you?

A. We had samples from both Mr. Phipps and Mr. Broch, which were identical.

Q. Did you find the product superior to any other product offered to you?

A. Yes, sir.

Q. In other words, it was of a higher grade?

A. That's correct.

Recross-examination

By Mr. Orlinsky:

Q. Did you ever tell Mr. Broch in your conversation with him prior to the placing of the order for Canada Foods that you had other offers from foreign producers of less than \$1.25 a gallon?

A. Not to my recollection.

By Mr. Orlinsky:

Q. How did the first \$1.25 arise? Was it first made up by Mr. Broch, or discussed between you and him?

A. Mr. Broch offered us the commodity at \$1.25 per gallon.

[fol. 55] Q. As far as you recall you had never revealed to him that you had been offered other products at \$1.25?

A. That's correct.

Hearing Examiner Lewis: When you talked to Mr. Broch, you had already received word from Mr. Phipps that Canada Foods could sell this to you at \$1.30 a gallon?

The Witness: That's correct.

Hearing Examiner Lewis: Had you at that time indicated to Mr. Phipps that that price was not acceptable, \$1.30?

The Witness: No, sir.

Hearing Examiner Lewis: You had it under consideration?

The Witness: We had it under consideration. We were in the market to buy and wanted to buy the best product we could at the best price we could.

Hearing Examiner Lewis: So at that point, as I understand it, Mr. Broch got in touch with you and you advised him that you had this offer of \$1.30 from Mr. Phipps?

The Witness: That's correct.

Hearing Examiner Lewis: Did you indicate who the broker was to Mr. Broch?

The Witness: I don't know if I did or not.

Hearing Examiner Lewis: Did you indicate who the seller was?

The Witness: Yes.

Hearing Examiner Lewis: How long thereafter did you hear from Mr. Broch?

The Witness: I would say a matter of three or four days.

Hearing Examiner Lewis: What was his advice to you at that time?

The Witness: He told me that Canada Foods were willing to accept the order at \$1.25 a gallon, due to the fact that it was a sizeable order.

Hearing Examiner Lewis: Did you convey that information to Mr. Phipps?

The Witness: Yes, sir.

[fol. 56] Hearing Examiner Lewis: Did you try to get him to come down to \$1.25 or what?

The Witness: No, I didn't try to get him to come down to \$1.25, but when we originally talked about the Canada Foods' deal, I indicated I would let him know whichever way we went. If we bought from somebody else, I would pass that information on to him.

By Mr. Orlinsky:

Q. After you placed the order with Mr. Broch, did you tell Mr. Phipps who you placed the order through?

A. Yes.

Q. In other words, you told Mr. Phipps it was Mr. Broch that was the broker that had placed the order?

A. That's correct.

* * * * *

Further Redirect examination

By Mr. Ragsdale:

Q. Mr. Kieffer, this substantial offer was delivered over a period of five or six months, was it not?

A. As I recall, deliveries were to start in November and be completed by the first of February.

Hearing Examiner Lewis: It was the same quantity you had offered to purchase through Mr. Phipps?

The Witness: That's correct.

By Mr. Ragsdale:

Q. I will ask you to examine this document and see if it refreshes your recollection, if it wasn't invoiced out from November 1954 to May 1, 1955?

Hearing Examiner Lewis: Don't we have those invoices here?

Mr. Ragsdale: They went back to Washington.

The Witness: The statement I paid, as I recall from what was on the purchase order, the deliveries were to be made between November 1 and February 1. They could have given me an extension of time.

By Mr. Ragsdale:

Q. And the quantities that were delivered on the various invoices range from approximately 3,000 gallons up to around 11,000, with quite a number around 4,000 or 4,400?

A. This 3,000 quantity presumably represents one car of roughly—oh, I would say 65 drums.
[fol. 57] This probably represents two cars and this three cars (pointing to invoice).

Q. As a matter of fact, you entered into two separate contracts covering that. You got not 500, but 550 drums of apple concentrate?

A. If we got 550, which I presume we did, it was probably something that was taken care of by a phone call, they said they had an extra 50 drums and if we would like to have it, it was available.

Q. And if it was two contracts and invoices, they were based on the \$1.25 price?

A. That's correct.

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Excerpts from testimony for Henry Broch & Co.

Hearing Examiner Lewis: All right. The deposition will be received in evidence as Respondent's Exhibit No. 1.

(The paper referred to, heretofore marked for identification Respondent's Exhibit 1, was received in evidence.)

Hearing Examiner Lewis: The deposition indicates that certain objections were made by counsel during the course of the taking of the deposition, and just, as a matter of record, I will overrule all objections so that all of the answers may remain in the record.

Hearing Examiner Lewis: All right. If there is any objection, the objection is overruled, and Commission's Exhibits 35-A and 35-B, 36 and 37, will be received in evidence.

(The papers referred to, heretofore marked for identification Commission's Exhibits 35-A and 35-B, 36 and 37, were received in evidence.)

HENRY BROCH was thereupon called as a witness for the Respondent and, having been previously duly sworn, testified as follows:

Hearing Examiner Lewis: Mr. Broch has already been sworn.

Direct examination

By Mr. Orlinsky:

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[fol. 58] Q. Do you ever, in your business, represent purchasers?

A. No.

Q. Do you ever, in your business, represent both sellers and purchasers?

A. Only the seller.

Q. Only the seller?

A. Yes, sir.

Q. Mr. Broch, about how many regular suppliers does Henry Broch & Company represent?

A. Oh, I would say, roughly, between twenty and twenty-five. It might be less than that, I do not know exactly.

Q. Would you say that a company representing twenty or twenty-five suppliers is a comparatively large company; large brokerage company?

A. No, of a more or less smaller size.

Q. Well, how does your company compare in size with some of the other food brokers in the country?

A. Well, you have some tremendously large food brokers in the country. We are comparatively very small compared to these.

Q. How many food brokers are there, approximately, in the United States?

A. It is hard to say, but I would guess that there are thousands of them.

Q. Do you know how many food brokers there are in the City of Chicago?

A. Well, I would guess between 200 and 250.

Q. And, do you know approximately or exactly how much annual business you do in the way of sales in a year, on an annual basis, Mr. Broch?

A. No, I do not know exactly what we do.

Q. Do you know approximately what you do?

A. I would say maybe three or four million dollars.

Hearing Examiner Lewis: What is that?

Mr. Orlinsky: Three or four million dollars.

The Witness: Three or four million dollars. It is hard to estimate.

Hearing Examiner Lewis: Between three and four million dollars?

[fol. 59] The Witness: Something like that.

By Mr. Orlinsky:

Q. Do you, in the course of your business, total up sales at the end of the year?

A. No.

Q. Do you total up your brokerage?

A. Well, yes.

Q. But, actually, you keep no record of total sales?

A. No.

Hearing Examiner Lewis: The three or four million dollars represents the actual sales of merchandise?

The Witness: That is right. That figure is not anywhere near accurate.

Mr. Ragsdale: Approximately?

The Witness: That is right.

By Mr. Orlinsky:

Q. That three or four million dollars, that doesn't represent brokerage fees, does it?

A. No.

Hearing Examiner Lewis: We understand that.

By Mr. Orlinsky:

Q. And, would you say that a company representing sellers where the total annual volume of sales is three or four million dollars is a large or a small company compared to other food brokers in the country?

A. Small.

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By Mr. Orlinsky:

Q. All right, Mr. Broch. When you start representing a principal seller as broker, do you, as a rule, enter into

a written contract with that principal to represent him for a specified length of time?

A. No, we have no contract whatsoever.

Q. Is it ever specified in writing between you and the principal sellers as to what your commission is to be?

A. No. There might be an indication, but never anything specific; definitely specified.

Q. Well, then, how do you know, when you start selling for a principal seller, what brokerage you are going to receive?

A. Well, all sales and all arrangements and anything involved are subject to confirmation.

[fol. 60] Q. Well, when you first start selling for a principal seller, is there any discussions as to how much brokerage you are to receive?

A. You have an indicated brokerage, but there are occasions when the seller doesn't stick to it, and we get a different brokerage from the principal seller.

Hearing Examiner Lewis: Don't you ever have correspondence pass between you and your principals as to what indicated brokerage will be paid?

The Witness: Yes, but there is nothing represented there.

By Mr. Orlinsky:

Q. When you receive an order from a customer, are you in any way able to assure that customer that you can give deliveries at a quoted price?

A. No. Any order we take is subject to confirmation by the seller.

Q. Confirmation as to what?

A. As to everything. If the merchandise is still obtainable and he wishes to confirm and the customer wants to do business with him, the price and everything is offered to the seller.

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Q. Mr. Broch, I show you Respondent's Exhibit 2 for identification, which is a card marked "Bulletin #1235", and seems to be—

Hearing Examiner Lewis: What is it?

Q. (Continuing, by Mr. Orlinsky)—What is that card?

A. It is a mimeographed quotation which we send out to a mailing list, offering merchandise which we have from our principals.

Q. Were cards, were identical cards to the one that I have shown you—were cards identical to Respondent's Exhibit 2 actually sent out by you?

A. Yes.

Hearing Examiner Lewis: When was that; during 1954?

The Witness: Yes, that date.

Hearing Examiner Lewis: And purports to be a quotation, I take it, to your customers?

[fol. 61] Mr. Ragsdale: Whose apple concentrate were you quoting at that price?

The Witness: Canada Foods Limited, Kentville, Nova Scotia.

By Mr. Orlinsky:

Q. Now, referring to Respondent's Exhibit 2, Mr. Broch, I call your attention to the writing, to the printing on the bottom "Offering subject to confirmation"—the phrase "Offering subject to confirmation." I will ask you what is meant by that?

A. In other words, it is not confirmed without having the complete consent of the seller. We have to confirm every order we take; it has to be confirmed by the seller.

Q. Confirmed as to what?

A. As to everything.

Q. As to price?

A. As to price; when he wants to sell or when he wants to ship.

Q. If it is all subject to confirmation, how can you quote these prices?

A. Well, it is actually more or less an invitation to talk business—let us put it that way. It is a general trade; general habit of the trade.

Q. In other words, you put out a price, which is an invitation to offer?

A. That is right.

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Hearing Examiner Lewis: Respondent's Exhibit 3 will be received in evidence.

(The paper referred to, heretofore marked for identification Respondent's Exhibit 3, was received in evidence.)

By Mr. Orlinsky:

Q. With reference to Respondent's Exhibit 3, Mr. Broeh, after you send copies of your sales memorandum, as you call it, to both the buyer and the seller, do both copies have to be accepted by both buyer and seller before you have a contract; is that right?

A. That is right.

Q. And I call your attention to a sentence in the wording at the bottom of this sales memorandum stating "Subject to confirmation of seller."

A. Yes.

[fol. 62] Q. Does that mean that after the buyer accepts that, it is still subject to confirmation by the seller?

A. It is still subject to confirmation by the seller.

Q. Do you ever have a situation, by this method of doing business, where the buyer accepts and the seller does not?

A. Very frequently.

Q. Very frequently?

A. Yes, sir.

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Q. Now, doing business for a new supplier, or for a new principal, let us call him, and when that principal pays you a certain percentage of commission, does that, as a rule, set a pattern as to what percentage of commission you are to get as long as you do business with that seller?

A. No, the commission and everything is changeable.

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By Mr. Orlinsky:

Q. You stated that the commission was changeable?

A. Yes.

Q. Changeable how often is a good question?

A. Well, we do not know. It can change any day or it can change back and forth as conditions allow it; as the seller sees fit, more or less.

Q. Well, when you talk about conditions that will allow it, what conditions are you referring to?

A. Well, some times the seller feels for one reason or other he can't pay the type of commission, so he pays less. We actually have no way of knowing why or what, but it is more or less dependent on market conditions, and crop conditions, and so on.

Q. Can you specify what market conditions occur that will change your percentage of commissions?

A. Well, at times, you have an over-supply of a certain item, and the seller is possibly losing money, so he doesn't pay the full brokerage; or, sometimes, even if he makes sufficient money, he feels he doesn't have to pay the full brokerage.

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Q. Mr. Broch, I show you a copy of Commission's Exhibits 1-A, 1-B, 1-C and 1-D, which purport to be a list furnished by your office to Mr. Carmichael of the Federal Trade Commission, listing the regular suppliers that you [fol. 63] represent, and also setting forth the brokerage that you received from those suppliers?

A. Yes; that is right.

Q. And, I ask you whether the brokerage that you set forth after the name of each supplier, as you intended it, whether that is the absolute fixed brokerage that you receive at all times from your suppliers?

A. No, we have no definite fixed brokerage. It is an approximate brokerage; what we may expect on sales.

Q. Well, by "approximate", what do you mean? What do you mean by that? You mean, what you expect to get from those suppliers, or not?

A. Well, usually, they indicate the amount that they will pay, in general, but as I said, they change it quite frequently.

Q. Well, will you go down the list of suppliers there, and will you indicate whether or not you ever received more or less brokerage from any one of those suppliers than the amount listed there?

A. Yes, definitely. It would be less instead of more.

Q. I call the list of suppliers— Well, first of all, I want to get this clear: The first group of suppliers you have listed are under D. B. Berelson & Company?

A. D. B. Berelson & Company are sales agents for a number of accounts that are listed here, and we are their brokers, and we get a part of their brokerage.

Q. Do you deal directly with the companies?

A. No. Most of the time we deal through the Berelson Company.

Hearing Examiner Lewis: Who pays you your commission; Berelson & Company?

The Witness: Berelson & Company.

By Mr. Orlinsky:

Q. Well, I call your attention to the first account listed under D. B. Berelson & Company, as John Inglis Frozen Foods Company, 706 East Lindsay Street, Stockton, California.

A. I think they have changed their address.

Hearing Examiner Lewis: That doesn't make any difference.

By Mr. Orlinsky:

Q. And also to the fact that you have brokerage, three per cent, listed for John Inglis Frozen Foods Company. [fol. 64] A. Yes.

Q. Do you always get three per cent on sales for John Inglis Frozen Foods Company?

A. No, there are quotations that would be less.

Hearing Examiner Lewis: The objection is overruled, and Respondent's Exhibit No. 4 will be received in evidence.

(The paper referred to, heretofore marked for identification Respondent's Exhibit 4, was received in evidence.)

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By Mr. Orlinsky:

Q. Now, from the exhibit there appears to be two different percentages of commission paid; one was one and a half per cent and the other three per cent.

A. Yes, sir.

Q. Can you tell us why the difference in commissions?

A. They just wouldn't pay more than that. They said—

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Q. And that is from D. B. Berelson & Company regarding the account of Ore-Ida Potato Products, Inc.?

A. That is right.

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Hearing Examiner Lewis: The objection is overruled and Respondent's Exhibit 5 will be received in evidence.

(The paper referred to, heretofore marked for identification Respondent's Exhibit 5, was received in evidence.)

Hearing Examiner Lewis: This again contains two different rates of commission?

The Witness: That is right.

Hearing Examiner Lewis: Three per cent and one and a half per cent.

The witness: It is on the same products.

Hearing Examiner Lewis: Do you know why you received two different rates of commission?

The Witness: They just don't pay it.

[fol. 65] Hearing Examiner Lewis: That was the decision of Berelson I take it.

The Witness: No, that was the decision of the sellers.

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Hearing Examiner Lewis: Ordinarily, when you make a sale, as broker, for a particular seller, you receive a statement from that seller, don't you?

The Witness: A brokerage statement.

Hearing Examiner Lewis: You receive a brokerage statement from the seller, do you not, when you deal directly with him?

The Witness: Yes, that is right.

Hearing Examiner Lewis: When you deal with a sub-broker, you get it from the broker?

The Witness: That is right.

Mr. Ragsdale: As sub-broker?

The Witness: That is right.

By Mr. Orlinsky:

Q. Mr. Broch, I show you Respondent's Exhibit 6-A and 6-B for identification, and ask you whether or not the two exhibits constitute a brokerage statement received by you from the Florida Citrus Cannery Cooperative?

A. That is a brokerage statement received by us from the Florida Citrus Cannery Cooperative.

Q. Was that received by you on or about the date that it bears?

A. It was received on February 13th, yes.

Q. And is the Florida Citrus Cannery Cooperative one of the suppliers that you listed on Exhibits 1-A to 1-D?

A. That is correct, yes.

Q. Now, I will ask you to look at this brokerage statement, and to indicate what percentage—well, first of all, it shows various customers' names; is that correct?

A. Yes.

Q. And, do you, according to this brokerage statement, receive from the Florida Citrus Cannery Cooperative the same percentage of commission for all the customers listed there?

[fol. 66] A. On some we received three and on other ones we received two per cent.

Q. Which ones did you receive two per cent on?

A. On Crichton Company and King Juices.

By Mr. Orlinsky:

Q. Now, Mr. Broch, on this particular account, Florida Citrus Canners Cooperative—?

A. Yes, sir.

Q. (Continuing)—do you deal directly with them?

A. We deal directly with them.

Q. And arrangement as to brokerage is made direct with the Florida Citrus Canners Cooperative?

A. That is right.

Q. Can you tell us what the reason is for your receiving three per cent for some of your customers and two per cent for some?

A. Well, when we started off with them they paid us three per cent, and, without any explanation or anything, they just dropped it to two per cent.

Q. When did it change to two per cent?

A. I can't tell you exactly. It was last year some time.

Q. Was this the first statement you got, February 13th?

A. I do not know which date it was.

Q. Well, was it on or about this period?

A. Probably about this period.

Q. And it has been two per cent since that time?

A. Yes.

Q. On all accounts?

A. That is right.

Q. When I say all accounts, I mean all sales.

A. All sales.

Q. Did you have any particular conversation with anybody connected with your seller which resulted in this change of commission?

A. They just said they wouldn't pay more. They just changed the commission; just that they wouldn't pay any more.

Hearing Examiner Lewis: Respondent's Exhibits 6-A and 6-B will be received in evidence.

(The papers referred to, heretofore marked for identification Respondent's Exhibits 6-A and 6-B, were received in evidence.)

[fol. 67] Hearing Examiner Lewis: And Respondent's Exhibits 7-A through 7-E will be received in evidence.

(The papers referred to, heretofore marked for identification Respondent's Exhibits 7-A through 7-E, were received in evidence.)

By Mr. Orlinsky:

Q. With reference to the Respondent's Exhibits 7-A through 7-E, representing statements from the Bauer & Loewy Trading Corporation to you, there appear to be three columns, and some of the columns are marked—well, there appears to be on some columns, or some are marked three per cent and some columns are marked two per cent, and there is one here, Exhibit 7-E, with a column marked one percent?

A. Yes.

Q. And the brokerage for the various customers is put into the various columns, some two per cent and some three per cent and some one per cent?

A. That is right.

Q. Can you tell us what the reason is for the difference in brokerage?

A. Well, the seller tells us what they are going to pay on it, and that is it. However, cocoa is a commodity on which prices change almost hourly, so we have to confirm each and every order and the brokerage. They hardly ever pay the same.

Hearing Examiner Lewis: On what; cocoa?

The witness: Yes.

Hearing Examiner Lewis: Are these all cocoa/sales?

The Witness: I imagine they are mostly; mostly cocoa. There might be something else, but I imagine they are mostly cocoa. Let me see. Yes, it seems that is all cocoa here.

Hearing Examiner Lewis: How about this one on 7-A?

The Witness: That seems to be ham.

Hearing Examiner Lewis: Peterson Meat?

The Witness: It seems to be canned ham.

Hearing Examiner: For Peterson Meat?

[fol. 68] The Witness: I think that is right. It seems to be canned ham for Peterson Meat. Let me see in this

column. That seems to be ham, yes. This seems to be one ham in between.

Hearing Examiner Lewis: There is one on 7-B, Peterson Meat.

The Witness: Yes.

Hearing Examiner Lewis: All of Peterson Meat is ham?

The Witness: Yes.

Hearing Examiner Lewis: Outside of Peterson Meat, do you have any others there that are not cocoa?

The Witness: No, it seems to be all cocoa, the rest of them. I am not sure, but there might be another one in there that is not cocoa.

By Mr. Orlinsky:

Q. Now, Mr. Broch, do the variation in commissions for the sale of cocoa for various customers have to do with who the customer is?

A. No.

Q. What is the reason for the variations in percentage of brokerage?

A. We do not know. The seller just tells they only get so and so much, and that we get so and so much brokerage.

Q. Well, do you have an idea as to what the reason is?

A. The indications in the market.

Hearing Examiner Lewis: Are you told that after you have made the sale? When are you told this?

The Witness: I will tell you, Mr. Lewis, the way this thing usually happens is this: that they give you a quotation on the price and at times the buyer says "Well, I won't pay the price." Competition is had for one reason or other, and then you go back to the seller, and the seller tells you that is the price, and there is so much off your commission; there is the price of one per cent included or whatever the brokerage amounts to.

Hearing Examiner Lewis: You represent them in several sales, does he call you and tell you, or write and tell you that on all sales there will be a different percentage? [fol. 69] The Witness: No.

Hearing Examiner Lewis: Does this happen after you have made the sale?

The Witness: After or before.

Hearing Examiner Lewis: Both ways?

The Witness: Both ways. There is no set rules; they vary the prices.

Hearing Examiner Lewis: All right.

By Mr. Orlinsky:

Q. Mr. Broch, I refer you now to Commission's Exhibit 1-A through 1-D, and particularly to the account listed therein of the Bauer & Loewy Trading Corporation, and to the brokerage listed for the Bauer & Loewy Trading Corporation, of one to three per cent, according to volume and selling price of product, and I ask you why you listed that, since your contention is that the brokerage varies also for some of the others. Why did you list the Bauer & Loewy Trading Corporation differently than the others?

A. Because they change more than anybody else, and almost on each order they give you a different brokerage.

Q. Mr. Broch, taking into consideration all the suppliers you represent, your regular suppliers, what would you say is about the average brokerage you get from all of them?

A. Well, the average might be about three per cent or less.

Q. Well, on the list of regular brokers which you furnished Mr. Carmichael of the Federal Trade Commission, how many on that list pay you an average brokerage of three per cent?

A. Only, I think, one or two.

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Q. Now, Mr. Broch, does Henry Broch & Company represent a broker by the name of Canada Foods Limited of Kentville, Nova Scotia?

A. You mean seller?

Q. A seller, yes; that is right.

A. Yes.

Q. And what products does Henry Broch & Company sell for Canada Foods Limited?

A. Mostly apple concentrate.

[fol. 70] Q. Now, how long have you represented Canada Foods Limited as a broker?

A. Some time since 1954.

Q. Well, can you place it a little more exact in 1954?

A. I think the first sales were made some time in the fall of 1954.

Q. Now, in your arrangements with the Canada Foods Limited in 1954, did you have any exclusive territory?

A. Well, yes, we had everything—

The Witness: We had the entire United States except Massachusetts, New York and Pennsylvania.

By Mr. Orlinsky:

Q. Who had Massachusetts, New York and Pennsylvania?

A. Later I found out it was Poole & Company had it in Massachusetts; and O. W. Cuyler in New York, and Tenser & Phipps had it in Pennsylvania.

Hearing Examiner Lewis: How was that arrangement made with respect to territory?

The Witness: The arrangement was made with Mr. Koldinsky in Chicago.

Hearing Examiner: Was it ever confirmed in writing?

The Witness: I had nothing in writing.

Q. Now, Mr. Broch, between the time you spoke to Mr. Fetzner at the convention and the time that Mr. Koldinsky came to visit you, did you have any correspondence with Canada Foods Limited?

A. I think there was some correspondence.

Mr. Ragsdale: What did you say?

The Witness: I believe there was some correspondence.

Mr. Ragsdale: All right.

By Mr. Orlinsky:

Q. And what was the reason for the correspondence?

A. Well, we offered him our services, as far as I can recall. I think we referred to the visit of Mr. Fetzner and just called his attention to our firm.

[fol. 71] Q. Did you, in any way, represent Canada Foods Limited before Mr. Koldinsky came to visit you in July?

A. No, we did not.

Q. When were the final arrangements made for your representation of Canada Foods Limited?

A. I believe it was in the fall of 1954.

Q. Well, when Mr. Koldinsky visited you in July, was there any discussion concerning your representing them?

A. Yes, there was.

Q. Did you, at that time, make arrangements regarding representation?

A. I think an arrangement was made on both occasions.

Q. And, at that time, did you discuss the rate of commission that was to be paid you?

A. Yes, we discussed it in general terms.

Q. Can you tell us, what, if anything, was said between you and Mr. Koldinsky as to the rate of commission to be paid you?

A. Well, yes, he said he would pay us five per cent. However, whatever we do is subject to confirmation.

Q. Did he tell you in what part of the country he wanted you to sell?

A. He wanted us to stay out of the States of Massachusetts, New York and Pennsylvania.

Q. Prior to that time, had Canada Foods Limited been selling any products in central United States?

A. Not to my knowledge.

Q. Or, in the western part of the United States?

A. Not to my knowledge. According to Mr. Koldinsky, they didn't.

* * * * *

By Mr. Orlinsky:

Q. Now, referring again to the discussion that you had with Mr. Koldinsky when he was in your office, was there any mention made at that time as to how much apple concentrate you thought you could sell for him?

A. Well, we guessed a figure, I believe it was, of one thousand drums per year.

Q. Was there any discussion as to how much you could sell for him for any one customer?

A. No.

Q. There was not?

A. No—I didn't get the question right.

[fol. 72] Q. Did you, in your discussion with Mr. Koldinsky mention how much you thought you would be able to sell for any one customer?

A. Usually, those sales are arranged, and what we had in mind was fifty to one hundred drums—

Hearing Examiner Lewis: Not what you had in mind, but did you have any discussion about that?

The Witness: Yes. Yes.

Hearing Examiner Lewis: That is what you told Mr. Koldinsky?

The Witness: Yes, that is the average run.

Hearing Examiner Lewis: I am not asking you what the average run is. What did you tell Mr. Koldinsky?

The Witness: I told him we could sell to quite a number of people fifty to one hundred drums.

Hearing Examiner: When was this conversation?

The Witness: I imagine it was both times Mr. Koldinsky was in my office.

Hearing Examiner Lewis: He was in your office both in July and the fall?

The Witness: In July some time, and in the fall.

Hearing Examiner Lewis: All right.

By Mr. Orlinsky:

Q. Did you, at the time you discussed representing Mr. Koldinsky, in July of 1954,—did you have in mind any particular customers that you thought you could sell to?

A. No. In other words, I mean, we figured a potential customer is anybody that was in the field or used concentrate.

Hearing Examiner Lewis: Had you been selling to any in that field before you represented Canada Foods Limited?

The Witness: Yes.

Hearing Examiner Lewis: You had?

The Witness: We had some sales.

Hearing Examiner Lewis: How about Smucker? Had you ever sold any to him?

[fol. 73] The Witness: I don't think we sold any concentrate before to Smucker; but we sold him other items.

Hearing Examiner Lewis: All right.

By Mr. Orlinsky:

Q. Now, when Mr. Koldinsky was in your office in July, 1954, did he at that time quote any prices to you?

A. Not the first time. I believe there was no mention as to that. It was before the new crop came in.

Q. Did you discuss with Mr. Koldinsky in any way the proposition as to what he paid other brokers in the United States?

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The Witness: I believe he said he paid four per cent to other brokers.

By Mr. Orlinsky:

Q. Mr. Broch, I show you copies of Federal Trade Commission's Exhibits 2-A, 2-B and 2-C, and I ask you what those exhibits represent?

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The Witness: That is an office memo.

Hearing Examiner Lewis: Your office memo?

The Witness: Our office memo, from which the orders came. It more or less consists of a scratch paid.

Hearing Examiner: What is the second one?

The Witness: The one is the order that has been signed by Smucker.

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By Mr. Orlinsky:

Q. Now, with reference to Exhibit 2-A, was that written on the date that it bears?

A. That one was written on the date it bears; that is right.

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Q. Now, was that pursuant to a telephone conversation?

A. That is right; correct.

Q. Who did you have the conversation with?

A. Mr. Kieffer.

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Q. And when did you have that conversation with Mr. Kieffer?

A. Well, we had conversations running for, I think, about ten days previous to this.

[fol. 74] Hearing Examiner Lewis: This is the tail end of it; is that right?

The Witness: That is right.

Hearing Examiner Lewis: That was after you talked to Mr. Koldinsky?

The Witness: That is right, and after I got confirmation from both ends.

By Mr. Orlinsky:

Q. When did Mr. Kieffer tell you "All right, to go ahead and write up the order?"

A. I think it was several days before.

Q. Then, the conversation which you had with Mr. Kieffer, upon which you wrote this order, was before October 27th?

A. Yes, considerably before.

Q. Why did you wait until October 27th to write the order?

A. Well, first of all, in this case, we don't write orders until we have all confirmations in, and some times the order hangs over for a day or two.

Q. Now, with reference to Commission's Exhibit 2-B, was that prepared in your office?

A. That is right.

Q. And was that prepared on or about the date that it bears?

A. That is right.

Q. Well, on the date that it bears?

A. On the date that it bears, yes.

Q. On October 27th, the date that it bears, did you send it over to Smucker & Company?

A. That is right.

Q. And you received that back from Smucker & Company?

A. That is right.

Q. It bears the name, J. M. Smucker & Company, Chicago, and accepted by H. W. Kiefer, and is dated October 28, 1954?

A. That is right.

Q. You must have received it some time after October 28, 1954?

A. That is right.

.

Q. Now, with reference to this order to James Smucker & Company that you wrote up, under date of October 27th, did you first contact the J. M. Smucker Company or did the J. M. Smucker Company contact you?

A. No, we contacted J. M. Smucker & Company.

Q. How long prior to October 27th was that?

A. It must have been from a week to ten days.

Q. How did you contact the J. M. Smucker Company?

[fol. 75] A. By phone.

Q. Who did you talk to, Mr. Broch?

A. To Mr. Howard Kieffer.

Q. Do you know what Mr. Kieffer's position is over there at the J. M. Smucker Company?

A. He is the purchasing agent.

Q. And you had dealt with Mr. Kieffer on previous occasions?

A. Yes, sir.

Q. But you testified you never sold him any apple concentrate; that you had never sold J. M. Smucker Company any apple concentrate before?

A. I don't think we did.

Q. What was the gist of the conversation?

A. Well, we offered the concentrate at \$1.30, and I think it was a while later, a day or so later, Mr Kieffer expressed interest in the merchandise. However, the price was too high, he said. We knew and he told us that competition was bad, particularly from foreign countries, and also we knew definitely that there was a Canadian competitor who delivered at the same price; a higher baume, which naturally would reduce the price considerably.

Q. Who first mentioned the fact that there were competitors in the market?

A. Well, Mr. Kieffer did, and we knew it. We knew it from a number of other buyers. We found the competition all along.

Q. Did Mr. Kieffer say how much he was willing to pay?

A. That is right. He gave us an offer of \$1.25.

Q. On the first conversation with Mr. Kieffer, did he then mention he was willing to buy at \$1.25?

A. That is right.

Q. And, did he then mention the competition?

A. Well, it was a conversation. He offered \$1.25 and that is all he wanted to pay, and in the course of the conversation, I mean, he told us also that there was foreign competition and that he could buy for less money.

Q. Did he then tell you how much he was willing to buy at \$1.25?

A. Yes, as far as I can recall, he would take five hundred barrels or more at \$1.25.

Q. Well, when Mr. Kieffer told you he was willing to take five hundred barrels at \$1.25, what did you tell him?

A. I told him I am going to contact my sellers and see [fol. 76] what their reaction is going to be.

Q. Did you tell him anything at all about what the chances were that the seller would sell at \$1.25?

A. No, I had no idea what the seller wanted to do.

Q. At the time that you first contacted Mr. Kiefer, did he tell you that any other broker in the United States had offered to sell Canada apple concentrate to him?

A. No.

Q. Between the time you first contacted Mr. Kiefer and the time of the sale, were you ever aware that more than, or that another broker was trying to get that sale?

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The witness: No. Nobody else was supposed to contact him since we had that territory.

By Mr. Orlinsky:

Q. After talking to Mr. Kiefer, did you receive an offer to buy at \$1.25—strike that. After talking to Mr. Kiefer, and you received the offer to buy at \$1.25, what did you do then?

A. We called Mr. Koldinsky, and made the offer to him.

Q. Can you place the telephone call you had with Mr. Koldinsky with reference to the October 27th order; how long before?

A. It was several days before. I couldn't place the date.

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Q. When you called Mr. Koldinsky, what did you tell him with reference to the Smucker offer?

A. Well, we gave him the offer we had, and we told him what we found out; what the foreign competition was doing, and also what some competition in Nova Scotia was doing, and apparently he was well aware of the fact.

Q. What did Mr. Koldinsky say?

A. Well, he said, "I will sharpen my pencil, and let you know."

Q. When next did you hear from Mr. Koldinsky?

A. I think it was a day later.

Hearing Examiner Lewis: Did he call you or did you call him?

The Witness: He called us.

[fol. 77] By Mr. Orlinsky:

Q. How many days would that be before the order was finally written up?

A. It must have been four or five or six days before.

Q. And, when Mr. Koldinsky called you, what did he say to you and what did you say to him?

A. Well, he gave us a price of \$1.25, and said to go ahead; that is the price, and at the same time he told us "You are going to receive three per cent brokerage".

Q. What did you say with reference to the three per cent brokerage?

A. I tried to object but he cut me off pretty fast.

Q. After he cut you off, did you raise any further issue regarding the three per cent?

A. No, there was no sense to it because he told me that is it.

Q. And, you were willing to handle this order for a three per cent brokerage?

A. That is correct, because I had no other choice in the matter. As a matter of fact, I am certain Mr. Koldinsky told me at that time that orders were coming out on a large scale, and they will all be on a three per cent basis.

Hearing Examiner Lewis: He said more orders were coming?

The witness: If any more orders of that size should be obtained, it will be the same three per cent brokerage basis.

By Mr. Orlinsky:

Q. Well, does the size of an order have anything to do with whether or not you agree to accept a less brokerage?

A. No. We accept what ever they give us.

Q. Did you consider this was a profitable deal to you?

A. Yes, as far as we are concerned, it is a very large order, and it is much cheaper in our office because, in order to obtain smaller customers for the same sized order, we might have to make thirty or forty or fifty or sixty long distance calls which are very costly in time and expense, actual cash expense, and on this three per cent, we would make more.

Hearing Examiner Lewis: Were all of your other sales to Smucker on a three per cent commission basis?

[fol. 78] That is right. At that time——

Hearing Examiner Lewis: Just answer that question.

The Witness: Yes.

Hearing Examiner Lewis: Did you continue to sell to them through the 1954 season?

The Witness: Yes, I think we did.

Hearing Examiner Lewis: Until the spring of 1955?

The Witness: 1954, either April or May, Smucker told me "We will take five hundred barrels and probably need considerably more, but will start out with 500 barrels."

Hearing Examiner Lewis: And you continued to sell to him for the balance of that season?

The Witness: That is right.

Hearing Examiner Lewis: And you sold to him in the 1955-56 season; to Smucker?

The Witness: Yes, we did.

Hearing Examiner Lewis: Was that also on the basis of a three per cent commission?

The Witness: Do I have to answer that?

Mr. Orlinsky: Go ahead.

The Witness: Yes.

Hearing Examiner Lewis: The same commission?

The Witness: The same commission.

By Mr. Orlinsky:

Q. As long as we have gotten into that, I will ask this: Now, during the 1954-1955 season, how many orders did you sell to Smucker?

A. Well, I think it was two or three I am not sure. In other words, it was a continuous order.

Q. Actually it was only one order?

A. I think it was written up in two or three orders, though.

Hearing Examiner Lewis: Did all of them amount to a little over 500 barrels?

The Witness: It amounted to seven or eight hundred barrels. It was considerable.

[fol. 79] By Mr. Orlinsky:

Q. I want to get this straight. In addition to the five hundred drums on this order, did you sell more drums later?

A. That is right.

Q. In the same season?

A. That is right.

Q. How much more?

A. I do not know exactly. It must have been another three hundred or four hundred barrels.

Hearing Examiner Lewis: Do you know what you sold them in the 1955-56 season?

The Witness: I think it was 1500 barrels.

Mr. Ragsdale: They were not shipped at one time?

The Witness: If we sell, Mr. Ragsdale, we sell it more or less on the basis that the buyer has to—well, we sell him over a season's deal.

Mr. Ragsdale: Separate orders; separate shipments?

The Witness: No, not separate orders; separate shipments, but not separate orders. It is all a part of one letter.

Mr. Ragsdale: And they pay for it as it is received.

The Witness: That is right.

By Mr. Orlinsky:

Q. Mr. Broch, you were here on May 8, 1956, at the hearing in this matter?

A. Yes.

Q. And did you hear Mr. Carmichael of the Federal Trade Commission testify?

A. Yes, sir.

Q. I refresh your memory from the transcript of his testimony?

Mr. Ragsdale: What page?

Mr. Orlinsky: On page 38.

By Mr. Orlinsky:

Q. In which the—

Mr. Ragsdale: I wonder if I can get Mr. Carmichael in here.

Hearing Examiner Lewis: It is in the record.

By Mr. Orlinsky:

Q. Well, I do not know where the question starts, but let us start with page 37, line 10, where it says:

[fol. 80] "The Witness:" —which is Mr. Carmichael speaking; this was a narration. "—The October 27, 1954, sale of five hundred steel drums of apple concentrate to the J. M. Smucker Company at \$1.25 per gallon was discussed fully between Mr. Broch and myself, and he related how it came to pass that Smucker was sold at \$1.25 on that transaction. He stated that the J. M. Smucker Company was among the only two or three customers in the country who ever did or could take apple concentrate in such a large amount.—"

By Mr. Orlinsky:

Q. (Continuing) "—That he had ascertained that the J. M. Smucker Company was in the market for 500 steel drums of the concentrate and that he had been informed very definitely by the purchasing agent for Smucker that Smucker was being offered apple concentrate of comparable quality at a price of \$1.25 f.o.b. New York in steel drums; and that Smucker absolutely would go no higher than \$1.25.

"Mr. Broch continued to relate that faced with this situation, he talked with one of the principal officers by telephone."

By Mr. Ragsdale:

Q. Is that Mr. Koldinsky?

A. (Continuing)—I do not have an independent recollection of name so I can't testify to it. It was an odd name, but it was the name of one of the principal officials of Canada Foods Limited of Kentville, Nova Scotia.

"Mr. Broch stated that the discussions went back and forth over the telephone from Chicago to Kentville with Canada Foods Limited, maintaining that it could not come down to \$1.25, and with Mr. Broch maintaining it was impossible to obtain the sale at a price higher than \$1.25. Mr. Broch told me, as a result of such telephonic conversations back and forth it was finally agreed between his company and Canada Foods Limited that if Henry Broch & Company would take only three per cent brokerage on this particular sale, Canada Foods Limited itself would lower its price enough so that the sale could [fol. 81], be consummated to the J. M. Smucker Company at a price of \$1.25 per gallon f.o.b. New York in steel drums."

By Mr. Orlinsky:

Q. Was that the conversation that you had with Mr. Carmichael?

A. Well, substantially, I guess it was. However, I am pretty sure I was misunderstood, misquoted or somehow; I mean simply that I said we agreed to it. They were told that we could sell at a price, or at the price quoted, and I was running back and forth, and phoning back and forth when we had this conversation, going on and on.

Q. Do you recall saying to Mr. Carmichael that Mr. Koldinsky said to you, "If you will take less commission; if you will take three per cent, we will make the deal"?

A. No, sir I don't think I did.

Q. Well, do you know, or are you just thinking that you didn't?

A. No. I mean, I couldn't have said it, because I was told what they would do about it.

Hearing Examiner Lewis: Well, you had to agree to it, didn't you?

The Witness: I could have said that I won't do it, and he could have said "You don't have to". In other words, that I don't have to do their business. I was actually told to take it or leave it.

By Mr. Orlinsky:

Q. Mr. Broch, did you at any time request Mr. Koldinsky to lower the price of the apple concentrate to Smucker?

A. Yes. I related the offer that I had from Smucker.

Q. Did you say in so many words "I want you to lower the price to \$1.25"?

A. No, sir.

Q. Did you ever say to Mr. Koldinsky, or anyone else at Canada Foods Limited that you wanted your brokerage cut so that the prices could be cut to Smucker?

A. No, sir.

Q. You did not?

A. No, sir.

Q. Did you ever make a request to Canada Foods Limited to cut your brokerage?

A. No, sir.

[fol. 82] Cross-examination.

By Mr. Ragsdale:

Q. Mr. Broch, I understand by your testimony that you are a broker in Chicago, representing twenty-five to thirty, approximately, sellers. That is correct, isn't it?

A. I think the amount is slightly less.

Q. Something of that kind?

A. That is right.

Q. When you work through a field broker, the commission is divided according to arrangements between you and such field broker?

A. That is right, sir.

Q. Now, do I understand you right, Mr. Broch, when you go out representing these twenty-five or thirty sellers,

producers, you actually do not know how much brokerage they are going to pay you?

A. That is correct.

Q. You are just working, not knowing what you are going to get?

A. It might not be as hazy as you put it, Mr. Ragsdale. We have a general idea. As indicated in our statement, we generally work on a three per cent basis, but every order is subject to confirmation, which includes the brokerage.

Q. Mr. Broch, is it not true that often, or practically invariably, when you make arrangements with a producer to sell his products that the understanding you have with him as to territory and brokerage is confirmed by letter?

A. No, not necessarily.

Q. Isn't it generally true?

A. I think there are very few letters. There is no set brokerage, Mr. Ragsdale.

Hearing Examiner Lewis: He didn't ask you that.

The Witness: Well, some—

Hearing Examiner Lewis: Do you have a letter confirming the arrangement; whatever the arrangement is?

The Witness: Not always.

Hearing Examiner Lewis: Whether flexible or inflexible, isn't that generally true?

[fol. 83] The Witness: Some don't have letters. Some say they will pay you three per cent or something, and it is still subject to negotiations.

Hearing Examiner Lewis: Isn't that in writing, subject to negotiations?

The Witness: No, sir.

Hearing Examiner Lewis: You don't have anything in writing?

The Witness: Mr. Lewis, our business is, I would say, ninety-five per cent oral.

Hearing Examiner Lewis: Only five per cent of your transactions?

The Witness: That is right.

Hearing Examiner Lewis: (Continuing) —are confirmed by writing?

The Witness: Very little. Our correspondence is comparatively very small. Everything we do mostly is oral.

Hearing Examiner Lewis: That is the actual sale, but when you come to represent a seller for the first time, don't you have something in writing between you and him?

The Witness: Some times we do.

By Mr. Ragsdale:

Q. Usually, practically invariably, you do have it confirmed?

A. No, no. We are representing a number of packers, and we never have anything in writing about the brokerage. There might be a few that we have a letter on. May I see that?

Q. You have letters from a few?

A. I think we have. I don't think we have anything from Berelson. I don't think we have any from the Florida Citrus Canners Cooperative. Just a second. I don't think we have any letters; very few. Actually I can't recall having any letters where there is any brokerage arrangement.

Q. And you go out working, making sales, extending sales efforts, and you actually don't know whether you are going to get three per cent or one per cent?

A. That is right.

Q. That is right?

A. Yes, sir.

[fol. 84] Q. That is your testimony?

A. That is right.

Q. What?

A. That is right.

By Mr. Ragsdale:

Q. Do I understand you, so far as your own business is concerned, your brokerage arrangements; that is, as to how much brokerage you are going to receive for making sales, is unknown to you, Mr. Broch?

A. Well I wouldn't put it that way, that it is unknown to us. We have a general idea of what our brokerage will be; mostly, it is three per cent. However, any sales that are being made also refers to brokerage, and is subject to confirmation. I mean at times we will get less, and possibly there will be times when we will get more.

Q. How long, Mr. Broch, have you represented the Florida Citrus Canners Cooperative?

A. Oh, it must be two or three years; four years; something like that.

Q. Will you explain who you arranged with to represent them as a broker in this territory?

A. Well, I imagine we made arrangements with the sales manager.

Q. The sales manager?

A. Yes, sir.

Q. Did you do that by letter, and tell them that you were a broker here?

A. We either phoned them or they visited us.

Q. How was it with that particular company; do you recall, Mr. Broch?

A. I believe I approached them at several conventions through a number of years.

Q. Did you tell them, or were there any negotiations as to how much brokerage or commission you were going to receive when you approached them?

A. It was always the same. They told us they were going to pay us three per cent; everything subject to confirmation, and suddenly you see they cut it, without any explanation.

Q. They just cut it without any explanation?

A. That is right.

Q. Well, now, how did you come to represent the Mutual Citrus Products Company at Anaheim, California?

A. Well, it is more or less the same procedure; we either wrote or phoned them, but I believe in that case, they checked the Chicago market on the most effective broker [fol. 85] and found, naturally, us.

Q. Did they then write you or wire you or get in touch with you? How did they get in touch with you?

A. No. They have a traveling representative, who is a very fine gentleman, the sales manager, and he visits us every so often.

Q. Did he tell you how much he would pay you, or did he tell you to go ahead and sell the goods and see what you got?

A. They said they would pay us on the pectin products five per cent, and on the other products they had, the deals—well, the average run of the deal was five per cent,

and if it was, if certain deals come up, they will talk to us; everything subject to confirmation. I do not know whether you know it or not, but as to the brokerage—

By Mr. Ragsdale:

Q. Mr. Carmichael, Mr. Broch, asked you for a list of suppliers with their addresses, the commodity involved and the rate of brokerage. That is what he asked for when you gave him this; was it not?

A. Just a second. It was not quite so. Mr. Carmichael had the free run of the office. In other words, he went over our files and picked those suppliers out, as far as I can remember now, and then he dictated to the girl. It was—

Q. He dictated this list?

A. He told the girl to make up the list. I probably was there, and agreed to it, and discussed it.

Hearing Examiner Lewis: Is it your testimony that this list was prepared by Mr. Carmichael—?

The Witness: I would say, Mr. Lewis—

Hearing Examiner Lewis: Just a minute. (Continuing)—or was it prepared by your office?

The Witness: It was prepared by Mr. Carmichael, but it was prepared by my corporation.

By Mr. Ragsdale:

Q. Mr. Carmichael testified, Mr. Broch had the list prepared under his direction in his office and was given to me. Transcript pages 34 and 35. Is that statement correct?

A. It is substantially true, definitely. I mean, we might [fol. 86] be here in disagreement about the mechanics of the transaction.

Q. But your office prepared this list?

A. Definitely.

Q. Mr. Carmichael did not prepare it and get the information out of your files?

A. Yes, I think so. I think he took out the file, and we went over the suppliers, and the girl typed it up.

Q. Did he dictate this list?

A. I can't remember that exactly. That is what I say. I am not quite sure of the mechanics of the transaction.

Q. Is this statement true or not? This is what Mr. Carmichael swore to under oath:

"I asked for and was furnished, under direction of Mr. Broch, a list of suppliers with their addresses; the commodity involved, and the rate of brokerage received by Henry Broch & Company." Transcript, page 34. "Mr. Broch had the list prepared under his direction in his office and was given to me."

A: Substantially, it is correct. Substantially, it is correct, Mr. Ragsdale. We might be in disagreement on the syntax, maybe, but, as far as I can recall, Mr. Carmichael took the names of these suppliers out of the file, and we discussed them, and I answered.

Hearing Examiner Lewis: What he is talking about is this. Did you give him a free run of the office, and he took the various names out and checked the files?

The Witness: Yes, sir.

Hearing Examiner Lewis: But he didn't ask you for the list to be given to him?

The Witness: I think we made it up together.

Hearing Examiner Lewis: But you gave him the information, didn't you?

The Witness: Yes, but he had the information already before from the files.

Hearing Examiner Lewis: Aside from that, you gave him the information, as I understand it, is that right, that was included in that list?

[fol. 87] The Witness: Yes.

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By Mr. Ragsdale:

Q. Mr. Broch, is it not true that you are still representing Canada Foods Limited?

A. That is right.

Q. Is it not true that you are selling to many of the same customers that you sold to in —?

A. That is right.

Q. (Continuing)—1954 and 1955, as illustrated on this list, Commission's Exhibit 16-A and 16-B?

A. What was the question?

Q. Is it not true you are still selling to many of the same customers, apple concentrate?

A. Yes.

Q. Is it not true, Mr. Broch, that you are still selling to these customers, apple concentrate, for your principal, Canada Foods Limited of Kentville, Nova Scotia, at a higher price than you are selling the same type of product to Smucker?

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The Witness: Well, so far there was only one sale made Mr. Ragsdale.

By Mr. Ragsdale:

Q. Is it not true that this sale was made at a lower price?

A. That is right.

Q. You have made only one sale?

A. Yes.

Hearing Examiner Lewis: The one sale was made, to whom; Smucker?

The Witness: Smucker.

Hearing Examiner Lewis: Is that the only sale you made since the previous season?

The Witness: No. To Smucker.

Hearing Examiner Lewis: Have you made sales to others?

The Witness: Sure.

By Mr. Ragsdale:

Q. At higher prices?

A. In smaller quantities.

[fol. 88] Q. And higher prices?

A. That is right.

Q. Is it not true that on the sales to Smucker you received a lower rate of commission?

A. That is right.

Q. Than on sales to other customers?

A. That is correct.

Q. Is it not true that this sale to Smucker was also delivered in a number of shipments?

A. All shipments are made on a call basis over a specified period of time.

Hearing Examiner Lewis: Were these shipments pursuant to a single order?

The Witness: Yes.

Hearing Examiner Lewis: What was the size of the single order?

The Witness: To Smucker?

Hearing Examiner Lewis: Yes.

The Witness: I think the last time, about fifteen hundred barrels, ~~is~~ not more.

Hearing Examiner Lewis: In one order?

The Witness: One order.

Hearing Examiner Lewis: All right.

By Mr. Ragsdale:

Q. Is Smucker required to take the full amount set out in the order, namely the fifteen hundred barrels?

A. Yes, he has a contract.

Q. He has a contract?

A. Yes.

Q. Suppose he does not take but twelve hundred barrels of the apple concentrate; what happens then?

A. Well, if the seller agrees he doesn't have to take it, but if the seller doesn't feel like it, it is a matter of litigation.

Hearing Examiner Lewis: Don't we have the contract or order?

Mr. Ragsdale: Not these later ones.

Hearing Examiner Lewis: We have the earlier one. I take it there is no difference in the wording.

[fol. 89] The Witness: Pardon me?

Hearing Examiner Lewis: I take it there is no difference in the wording?

The Witness: No.

Hearing Examiner Lewis: In the later ones from the early ones?

The Witness: We received a purchase order from Smucker which is being mailed to Canada Foods Limited; the same order.

.

By Mr. Ragsdale:

Q. Mr. Broch, Mr. Carmichael testified that Smucker was among the two or three consumers who could or would take apple concentrate in large quantities; that you found out that Smucker was in the market for five hundred steel drums and would not pay more than \$1.25; that faced with this situation, you talked with one of the principal officers of Canada Foods Limited by phone; that the discussion went back and forth over the telephone from Chicago to Kentville, with Canada Foods Limited maintaining it could not come down to \$1.25 and that you, Mr. Broch, maintained it is impossible to obtain the sale at a price higher than \$1.25; that, as a result of such telephonic conversation back and forth, it was finally agreed between your company, Henry Broch & Company, and Canada Foods Limited, that if Henry Broch & Company would take only three per cent brokerage on this particular sale, Canada Foods Limited would lower its price enough so that the sale could be consummated to Smucker at the price of \$1.25 a gallon.

That is what Mr. Carmichael testified to. Is that true, Mr. Broch?

A. Wait a second. It depends on what you call "agreed", Mr. Ragsdale. I told you before that we talked to Canada Foods Limited, and we were told that if we consummated the sale at \$1.25 "your brokerage is three per cent". I mean, we had no jurisdiction in the matter whatsoever.

Q. And there were several telephone calls made in connection with this?

A. Yes.

Q. You weren't to make the sale, and Mr. Koldinsky said you could make it at \$1.25; is that not true?

A. I imagine at the beginning he tried to get \$1.30, and [fol. 90] so did we.

Q. The conversation went to and from you and him?

A. I imagine so.

Q. And finally he said to you, "All right, we will take the \$1.25, but you get three per cent, and we will make up the difference"?

A. No, sir, there was no conversation about the difference. Mr. Koldinsky told me to consummate the sale.

Hearing Examiner Lewis: Who would make up the difference, if you took less than five per cent, and you take three per cent, obviously, in order to sell it for \$1.25, he was going to have to make up the difference. You weren't going to make it up, were you?

The Witness: I certainly wouldn't make it up.

.

The Witness: We don't take physical possession. We are actually nothing but a glorified office boy. We are just working and trying to get as high a brokerage as we possibly can.

.

Docket No. 6484

May 8, 1956.

• Printed at Newfield 6-1955

SALES CONTRACT

26175

HENRY BROCH & CO.**111 & 114 Ave**

Hyde Park National Bank Building

1525 EAST 53RD STREET

Chicago 18, Ill.

CUSTOMER'S ORDER NO.

FOR ACCOUNT OF Canada Foods, Ltd.SOLD TO The J. M. Smucker Co.ADDRESS Box 280 - No. Mainland ORRVILLE Ohio(HBR)
SOLD THROUGH

500 Steel Drums - Appleb Entente

36° Baume

2125

Packed 55 to 60 gell per drum
Quality as per sample submittedTERMS: Reg

FOR

New York

SHIPPING DATE

Jan 1st to April 1 1955.

SHIP VIA

FEDERAL TRADE COMMISSION

EXHIBIT NO 2-A

PICK UP BY

Henry Broch

Remarks

IN THE CITY OF NEW YORK
5456 11th St. N.Y.C. 10019

Seller Guarantees Goods to Conform to the National Puffed Level. All Disputes Arising Under This Contract Shall be Arbitrated in Usual Manner.

This memorandum shall be subordinate to more formal contract when and if such contract is executed. In the absence of such contract this memo represents the contract of the parties. Subject to confirmation of seller.

ACCEPTED

Buyer

HENRY BROCH & CO.

HBR

Docket No. 6484

May 8, 1956.

SALES CONTRACT

Henry Broch & Co.

BROKERS AND SALES AGENTS

CABLE ADDRESS MINNECO

FROZEN
FRUITS
FROZEN
VEGETABLES
SEAFOOD
CANNED
GOODS
HONEY
ETC.

PHONES: BUTERFIELD 8-1940

HYDE PARK NATIONAL BANK BUILDING
1525 EAST FIFTY THIRD STREET
CHICAGO 15, ILLINOIS

Sold for Account

Canada Foods Limited
Kentville, N. S., Canada

Sold To

The J.K. Hunter Co.
Box 200 - No. Walnut, ON VILL, OHIO

Ship To

Ship When

January 1st to April 1st, 1955

Ship Via

Prices F.O.B.

New York - Duty Paid

Sold Through

TERMS:

Regular

Quantity

Article

If incorrect return at once. Otherwise this constitutes a firm sale

Please be sure to send us copies of *Inventory* *check* *for* *lot*
 Docket No. 6484 *Henry Broch*
 IN THE *OFFICE* *of* *the* *Commissioner* *of* *the* *Food* *and* *Drug* *Administration*
 DATE *5/15/56* *Henry Broch*
Official Signature

500 - steel drums -

APR 20 1955

363 drums

Packed 53 to 60 allons per drum.

Quality same as sample submitted.

\$1.25 per gal.

PLEASE SIGN AND RETURN

BLUE COPY ONLY TO
HENRY BROCH & CO.

Seller Guarantees Goods to Conform to the National Pure Food Laws. All Disputes Arising Under This Contract Shall be Arbitrated in Usual Manner. This SALES MEMO constitutes an EXECUTORY CONTRACT between the SELLER and BUYER indicated above and made through ourselves as BROKERS in the transaction. We should be advised at once if incomplete or incorrect in any respect and any alterations or cancellations should be had or confirmed in writing by the BUYER or the SELLER addressed to this office and subject to the legal rights of the other party in the matter. If a more formal contract shall be executed this SALES MEMO shall be subordinate to it. Subject to confirmation of seller. On all sales made F.O.B. shipping point both the seller and ourselves act only as the agents of the buyer in arranging for transportation or for any storage in transit or at destination. The buyer assumes a risk of a loss or damage pertaining to the above and herewith releases and holds harmless both the seller and ourselves for all claims in connection therewith. Acceptance of our services is a concurrent acceptance of this condition.

ACCEPTED.

*Henry M. Amick**John H. Kupper*

HENRY BROCH & CO.

Lit 20/54

May 8, 1956.

SALES CONTRACT

Henry Broch & Co.

BROKERS AND SALES AGENTS

CABLE ADDRESS HENBROCO

FROZEN
FRUITS
FROZEN
VEGETABLES
SEAFOOD
CANNED
GOODS
HONEY
NUTS, ETC.

PHONES: DUMMFIELD 2-1500

HYDE PARK NATIONAL BANK BUILDING
1525 EAST FIFTY THIRD STREET
CHICAGO 15, ILLINOIS

Paid for Account

Canada Foods Limited
Kentville, N.S., Canada

DATE

October 8, 1954

Sold To

ORDER NO.

Ship To

J. M. Smucker Co.
P.O. Box 280, CLEVELAND, OHIO

BUYERS ORDER NO.
26426

Ship When

Ship Via

Prices F. O. B.

New York

TERMS:

Sellers

Sold Through

Quantity

Article

Price

50 steel rods

360 pounds

FEDERAL TRADE COMMISSION
DOCKET NO. 6484
IN THE MATTER OF
DATE 5/18/56
WITNESSES
By *Henry Broch & Co.*
H. Broch & Co., Inc., Official Interpreters
H. Broch & Co., Inc., Official Interpreters

1.00 per lb.

PLEASE SIGN AND RETURN

BLUE COPY ONLY TO
HENRY BROCH & CO.

Guarantees Goods to Conform to the National Pure Food Laws. All Disputes Arising Under This Contract Shall be Arbitrated in Usual Manner in the transaction. This SALES MEMO constitutes an EXECUTORY CONTRACT between the SELLER and BUYER indicated above and made through ourselves as BROKERS in the transaction. We should be advised at once if incomplete or incorrect in any respect and any alterations or cancellations should be made or confirmed in writing by the BUYER or the SELLER addressed to this office and subject to the legal rights of the other party in the matter. If a more formal contract shall be executed this SALES MEMO shall be subordinate to it. Subject to confirmation of seller.

On all sales made F.O.B. shipping point, both the seller and ourselves act only as the agents of the buyer in arranging for transportation or for any storage in transit or at destination. The buyer assumes all risk of either loss or damage pertaining to the above and hereinafter-released and holds harmless both the seller and ourselves for all claims in connection therewith. Acceptance of our services is a concurrent acceptance of this condition.

ACCEPTED: *Henry M. Smucker Co.*
By *Henry M. Smucker*

HENRY BROCH & CO.

[fol. 94]

F.T.C.—EXHIBIT No. 4

Docket No. 6484

FILE COPY

May 8, 1956.

CANADA FOODS LTD.—FRUIT DIVISION FOOD MANUFACTURERS KENTVILLE NOVA SCOTIA

SOLD TO
The J.M. Seucker Co.,
Box 880, No. Walnut,
Ship Creek, Ohio.

264 26

OUR ORDER NO.
SHIPPED FROM
DATE *December 9/53*
SALESMAN *Henry Brock*
DATE SHIPPED
CUSTOMER'S ORDER NO.

TERMS *Net 30 Da.* VIA *SG* "EXHIBIT PER MOP" P.O. *NEW YORK* FEDERAL TRADE COMMISSION *EXHIBIT NO. 324*
NO PAGE PRODUCT QUANTITY
DOCKET NO. *6484*
IN THE MATTER OF *Henry Brock & Co.*
DATE *5/1/56* WITNESS
ELEANOR G. RUBIN, INC., Official Reporter
50 Gross Balled Apple Cider 360 Bunches 2,962 US Gals. @ 1.85 *53,710.00*

Gross 37,689 lbs.
Tare 6,742 "
Net 30,947 "

Conversion Used: US 61 - 11.04 lbs.

See attached:

Also of the same date:

FRU 0647

MODELS BUSINESS FORMS LTD.

CX 4.10

[fol. 95]

F.T.C.—EXHIBIT No. 5

Docket No. 6484

May 8, 1956.

FILE COPY

CANADA FOODS LTD.—FRUIT DIVISION FOOD MANUFACTURERS KENTVILLE NOVA SCOTIA

SOLD TO
The J.M. Smucker Co.,
Box 280 No. Walnut,
ORRVILLE, Ohio.

OUR ORDER NO
SHIPPED FROM
DATE January 8, 1955
SALESMAN Henry Brock
DATE SHIPPED Jan. 7 1955
CUSTOMER'S ORDER NO

26175

Terms net 30 da.

VIA SS "Fort Hamilton" FOR New York

NO. PAGE.

PRODUCT

QUANTITY

PRICE

CAR NO

TOTALS

75 drums Filled "No. 1" Elder 36" Baume 4,421 US Gals @ \$1.25 \$5,536.75

Gross: 56,245 lbs.
Tare: 7,249 "
Net 49,096 "

Conversion Used: 1 US gal = 11.02 lbs.

Tally Attached:

Alcoholic content less than 1 of 1%.

FRU 0670

0676

FEDERAL TRADE COMMISSION
DOCKET NO. 6484
IN THE MATTER OF
Henry Brock & Co.
FEDERAL TRADE COMMISSION
WASHINGTON, D.C.
Official Reporter
J. E. B. B. B. B.

[fol. 96]

F.T.C.—EXHIBIT No. 6

Docket No. 6484

May 8, 1956.

FILE COPY

CANADA FOODS LTD.—FRUIT DIVISION

FOOD MANUFACTURERS
KENTVILLE NOVA SCOTIA

SOLD TO The J. J. Wachter Co.,
Box 200, Kentville, N.S.
SHIP OH-WILL, N.S.

OUR ORDER NO.
SHIPPED FROM MAY 20/56
DATE
SALESMAN Henry Froehlich & Co.
DATE SHIPPED
CUSTOMER'S ORDER NO.

TERMS	et 30 da	VIA REGISTERED MAIL	FOR NEW T.M.	PRICE	TOTALS
NO PAGE	PRODUCT	QUANTITY			

75 drums Netted Apple Cider 750 Pounds, L, 143.41 IS Oale 11.25 15,554.26

Gross: 56,632 lbs.
Tare: 7,209 "
Net: 49,423 "

Conversion used: 1 US Gal = 3.785 ltr.

Tally Attached:

Alcoholic content loss the 1 of 12

FRU 0695

FEDERAL TRADE COMMISSION
DOCKET NO. 6484
COMMISSION EXHIBIT NO. 36
IN THE MATTER OF Henry Froehlich & Co.
DATE 5/8/56
WITNESS X. (Broch)
12.
FILED IN THE OFFICE OF THE CLERK OF THE COURT
AT KENTVILLE, N.S.

101

[fol. 97]

F.T.C.—EXHIBIT No. 7

Docket No. 6484

May 8, 1956

FILE COPY

CANADA FOODS LTD.—FRUIT DIVISION
FOOD MANUFACTURERS
KENTVILLE NOVA SCOTIA

SOLD
TO

The J.M. Smecher Co.
Box 280, No. Walnut,
Mt. VILLI, Ohio.

SHIP
TO

OUR ORDER NO

SHIPPED JANUARY 17, 1955

DATE

SALESMAN

DATE SHIPPED

JANUARY 15/

CUSTOMER'S ORDER NO

TERMS Net 30 da

VIA 55 "PORT HAMILTON"

FOR

NEW YORK

CAR NO

NO PAGE

PRODUCT

QUANTITY

PRICE

TOTALS

75 drums -cilled-apple cider 300 mm, 4.434.30 US gals. @ 01.25 05,542.96

Gross 56,745 lbs.
Tare 7,618 lbs.
Net 49,127 lbs.

Conversion Used: 1 US Gal = 11.08 lbs.

Tally Attached

Alcoholic content less than 40% ABV.

FEDERAL TRADE COMMISSION
DOCKET NO. 6484
IN THE MATTER OF
DATE 5/8/56
WITNESSES
J.E. Brandenburg
EXHIBIT NO. 27
Henry Brock & Co.

FRU 0714

MADE IN U.S.A.—U.S. FOODS, INC.

13

[Seal]

F.T.C. Exhibit N

Docket No. 6487

May 8, 1956.

FILE COPY

CANADA FOODS LTD. - FRUIT DIVISION

FOOD MANUFACTURERS

KENTVILLE NOVA SCOTIA

SOLD
TO
Wm J. Tucker Co.
Carmel, N.Y., U.S.A.

5410
700

DATE 5/10/55
NAME Harry L. Lippch
NATL SWAN
DATE Swapped

times. Not so do

0-111470-1 PRICE:

New York

Send On

75 dress called "ple" "lar" y's dress, h. 44 7.65 US Cal's. 1.85

15,559.56

Gross - \$5,741 11c.
Tare - 7,116 11c.
Net - \$49,360 11c.

Tally Attached:

100

Alcoholic content less than 1% of 1:1.

FEDERAL TRADE COMMISSION

DOCKET NO. 6484

FRU 0761

ON THE MATTER OF

Henry Beach & Co.
Brook

ATLANTA, Ga., Dec. 10. (AP)—

Vehicular

[fol. 99]

F.T.C.—Exhibit No. 9

Docket No. 6484

May 8, 1956.

FILE COPY

CANADA FOODS LTD.—FRUIT DIVISION

FOOD MANUFACTURERS

KENTVILLE N.S. & COTIA

SOLD TO
The J. M. MacIsaac Co.,
Box 20, No. 1st St.,
Chic. Ill.

OUR ORDER NO.

SHIPPED FROM

DATE

Pay 1st 1955

SALESMAN

DATE SHIPPED

CUSTOMER ORDER NO.

P. 257,000

CAR 222650, 264782.

TERMS Net 30 ds VIA S. & C. M. L. 100% FOR New York

NO PAGE PRODUCT QUANTITY PRICE TOTALS

200 drums Boiled Apple (100% pure) 11,445 lbs. @ 1.25 \$14,831.25

Gross 151,195 lbs.
Tare 19,731 lbs.
Net 131,467 lbs.

Tally Attached

Conversion Used 1 lb. @ 11.00 lbs.

Alcoholic content less than 1% of 1%.

MOONSHINE COMMISSION
FEDERAL TRADE COMMISSION
IN THE MATTER OF
JAMES M. LEE
v. J. M. MacIsaac Co.
DATE 5/8/56
X 7

FRU 0782

JAMES M. LEE & CO. LTD.

[fol. 100]

F.T.C.—EXHIBIT No. 10

Docket No. 6484

May 8, 1956.

Canada Foods Limited
 Kentville, N.S., Canada
 Owen & Mowrey, Inc.
 209 Oakland, MILFORD, MICH.

October 22, 1954
 (10/14/54)
 26062

End of December 1954

Truck

New York

HB-R

Regular

CORRECTED ORDER

) Truckload - about 40 to 45 Steel Drums

APPLE CONCENTRATE @ \$1.30 per gallon

36° Beaume

Packed 55 gallons to 60 gallons per drum

FEDERAL TRADE COMMISSION

DOCKET NO. 6484 EXHIBIT NO. 10

IN THE MATTER OF
 DATE 5/17/56 WITNESS

Henry Brock & Co.

ELECTROREPORTER, INC., Official Reporter

H. E. Brock & Co.

(X 10)

[fol. 101]

P.T.C. - Export No. 11

Docket No. 6484

May 8, 1956

FILE COPY

CANADA FOODS LTD. - FRUIT DIVISION FOOD MANUFACTURERS KENTVILLE NOVA SCOTIA

SOLD
TO
209 Oakland
MILFORD, Wisn.

SHIP
TO

Over & Morey Inc.,
209 Oakland
MILFORD, Wisn.

OUR ORDER NO
SHIPPED FROM
DATE
SALESMAN
DATE SHIPPED
CUSTOMER'S ORDER NO

December 3, 1954
Henry Brock & Co

TERMS Net 30 da

VIA AIR "British Princess" New York

NO PREP

PRODUCT

QUANTITY

CAR NO

TOTALS

50 Drums Cilled Apple Cider 36° Baumé 2,968 U.S. Gal @ \$1.30 \$3,859.40

Gross: 17,679 lbs.
Tare: 4,785
Net: 12,894

Conversion used: 1 US Gal - 11.06 lbs.

Tally Attached:

Alcoholic content less than 1/2 of 1%

FEDERAL TRADE COMMISSION

DOCKET NO 6484

IN THE

DATE

Henry Brock & Co
Brock

FRU 0637

H.B. Handwriting

May 8, 1956.

Canada Foods Limited
Kentville, N.S. Canada
Adler Foods Co.
1177 Diamond, EVANSVILLE, IND.

November 3, 1954

2 6 2 2 1

January 1955

New York
HB-B

Regular

Note: This order supersedes corrected order # 26088
dated 10/22/54 and original order dated 10/14/54

(1) Truckload - about 40 to 50 Steel Drums

APPLE CONCENTRATE

\$ 1.30 per gallon

36° Baume

Packed in 55 to 60 gallon drums

FEDERAL TRADE COMMISSION
DOCKET NO. 6484
IN THE MATTER OF
DATE 5/19/56
WITNESS
ELECTRONIC WRITER, INC., CHICAGO, ILL.
By *Harry Brock & Co.*

EXHIBIT *H*
Reviewed with *Brock*
11-551017-1 11-19-55-
Jr. *CC*

107

(fol. 103)

P.T.C. ~~REDACTED~~

Docket No. 6484

May 8, 1956

FILE COPY

CANADA FOODS LTD.—FRUIT DIVISION

FOOD MANUFACTURERS
KENTVILLE NOVA SCOTIA

SOLD TO
Adler Foods Co.,
1171 Diamond
Kentville, N.S.

OUR ORDER NO
SHIPPED FROM

DATE
December 3, 1954
SALES
DATE SHIPPED
Henry Breck & Co
CUSTOMER'S ORDER NO

26221

TERMS	Net 30 Days	VIA	William Frings	Box	YORK
NO PAGE	QUANTITY	PRICE	TOTALS		

50 Bruce Hulled Apple Older 36° Basso 2,963 U.S. Gals @ \$1.30 \$3,851.90

Gross: 37,552 lbs
Tare: 4,717
Net: 32,835

Conversion: 1 U.S. Gal = 3.785 lts

Tel: Attached:

Alcoholic content less than 1/2 of 1%

FEDERAL TRADE COMMISSION

POCKET NO. 6484

EXHIBIT NO. 2-13

IN THE
DATE 5/8/56
Henry Breck & Co.
Breck

By W. E. Breck
19

FRU 0643

Fruit Division

Apple Concentrate - Apple Juice - Powdered and Liquid Pectin

Phone 1100

Henry Broch & Co.
Hyde Park National Bank Building
1525 East Fifty Third Street,
Chicago 15, Illinois
U.S.A.

FEDERAL TRADE COMMISSION
CONSUMER STAFF REPORT #1
#1590-01

SECRET NO.

IN THE MATTER OF
DATE _____
WITNESS
ELECTRO-UNIT, INC., Official Registered

Dear Mr. Brock:-

We have pleasure in quoting our new prices on Applz Concentrate

APPLE CONCENTRATE 368⁰. depectinized, filtered and free of preservat
ves

in steel lined drums 55-60 gallons.....	\$ 1.30
in oak wood barrels, 40-45 gallons	\$1.25
in 6 gallon cans	\$1.32

Price is per U.S. Gallons, U.S. Currency, C.I.F. New York, duty paid.

I expect to be in Chicago during the coming week for one or two days and I hope to have the opportunity of seeing you on my trip.

Yours very truly

Canada Foods Limited
Fruit Division

L. Koldins,

०३

FEDERAL TRADE COMMISSION
 CONSUMER SUIT NO. 7-6
 FEDERAL TRADE COMMISSION
 CONSUMER SUIT NO. 7-6
 ACT NO. 6484 Harry Byrd
 THE WIT OF WITNESS
 ELECTRIC, INC. Official Reporter
 DATE 5/11/53 BY [Signature]

✓
x
v

9.11.1933
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 11.11.1933
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[fol. 105]

FTC—EXHIBIT No. 15

Docket No. 6484. May 8, 1956

Canada Foods Limited, Fruit Division, Kentville, Nova
Scotia

November 15, 1954.

Henry Broch & Co., Hyde Park National Bank Building,
1525 East Fifty-Third Street, Chicago 15, Illinois,
U.S.A.

Attention Mr. Henry Broch

Re: Apple Concentrate Warehousing

DEAR MR. BROCH:

We would like very much to ship one carload consisting of partly drums partly cans for your stock immediately.

However, we are still slightly worried with regards to this consignment. We would have the assurance from you, that you will be in the position to sell all our products for the minimum price which is:

\$1.30 per U.S. gallons delivered in drums, and

\$1.32 per U.S. gallons delivered in cans, F. O. B. New
York.

Additional charges would be 15¢ per gallon for additional freight rate for F. O. B. Chicago, plus cartage and storage fees, in Chicago. I do not believe though, that this expense will exceed more than 10¢ per gallon.

Of course, in case that some customers would order Concentrate directly from the car, they would save 10¢ per gallon for cartage and storage. If you agree with our calculation, please let us know as soon as possible by wiring us about the quantity of barrels and cans which should be shipped.

Yours very truly, Canada Foods Limited, Fruit
Division.

[fol. 106]

FTC—EXHIBIT No. 16-A

Docket No. 6484. May 8, 1956.

Henry Broch & Co.

COMMISSIONS

Date	Invoice No.	Customers	Amount	
October 12/54	0533	Squire Dingee Company	\$5,199.39	
October 30	0572	Baumer Foods Inc.	6,237.84	
October 30	0573	Blue Plate Foods Inc.	6,615.75	
December 3	0643	Adler Foods Co.	3,851.90	
December 2	0650	The Kroger Company	18.00	
December 10	0651	Lincoln Foods, Inc.	9.00	
December 10	0652	Glaser Crandell Co.	90.00	
December 2	0653	The Zipp Manufacturing Co.	9.00	
December 10	0654	B. A. Railton Co.	540.00	
December 10	0655	S. C. Clayton Co., Inc.	9.00	
December 18	0658	Lester Lawrence Co.	686.89	
December 18	0659	H. C. Schranck Co.	90.00	
December 18	0660	The Phillips Co.	863.97	
January 18/55	0686	Squire Dingee Co.	5,777.72	
January 26	0694	Owen & Mowrey Inc.	3,814.81	
February 14	0712	Heineman Coffee & F. Prod.	87.72	
February 14	0713	Lester Lawrence & Co.	257.01	
February 16	0715	Blue Plate Foods Inc.	6,567.33	
February 16	0716	American Syrup & Preserv. Company	3,951.34	\$44,676.67

Less Credit Notes

December 2/54	Squire Dingee	371.38	
December 18	3 drums taken by order of	234.00	
December 18	H. Broch for Phillips Co.		
	B. A. Railton Co.	28.80	
January 3/55	Squire Dingee Co.	17.56	
January 18	B. A. Railton Co.	11.36	\$ 663.10

\$44,013.57 at 4% — \$1,760.54

44,013.57

December 9/54	0647	The J. M. Smucker Co.	3,710.00	
January 8/55	0676	The J. M. Smucker Co.	5,538.75	
January 26	0695	The J. M. Smucker Co.	5,554.26	
February 15	0714	The J. M. Smucker Co.	5,542.98	20,345.99

\$20,345.99 at 3% — \$ 610.38

\$2,370.92

[fol. 107]

FTC—EXHIBIT No. 16-B

Docket No. 6484. May 8, 1956.

CANADA FOODS LIMITED
Fruit Division

COMMISSIONS, Henry Broch & Co.

Date	Invoice No.	Customer	Amount
March 15/55	0741	Squire Dingee	\$5,786.29
March 25	0751	Mrs. Pedgrifts Jellies Inc.	65.70
March 25	0752	Steinfeldt-Thompson	9.38
March 25	0753	Mrs. Pedgrifts Jellies Inc.	75.09
March 25	0754	H. C. Schranck Co.	93.85 \$6,030.31 at 5%
			<u>\$301.52</u>
March 30	0761	M. Smucker Co.	\$5,559.56 at 3% 166.79
			<u>\$468.31</u>
		Last commissions read:	\$44,013.57 at 4% \$1,760.54
		Should read:	44,013.57 at 5% \$2,200.68
		Difference:	<u>\$440.14</u>
			<u><u>\$908.45</u></u>

FTC—EXHIBIT No. 17

Docket No. 6484. May 8, 1956.

Canada Foods Limited, Fruit Division

Mr. H. Broch, By Commission

Concentrate:

Apr 22 Inv #0782 Smucker \$14,831.25
 Commission at 3% \$444.94

[fol. 108] FTC—EXHIBIT No. 19

Docket No. 6484. May 10, 1956.

October 1, 1954.

J. M. Smucker Company, Orrville, Ohio

GENTLEMEN :

Canada Foods Limited, Kentville, Nova Scotia, who is parent firm of M. W. Graves & Company, Limited, Berwick, Nova Scotia advise us that they are processing Apple Concentrate on a large scale and will give us their price in the next 5 or 6 days.

They point out that they are especially equipped for processing of Concentrate and use tin layer evaporators. Concentrate in their factory is produced continuously by 110° F within only a few seconds.

Prices for this season have not been settled as yet, but they hope to have them within a week and will contact us as soon as it is set.

Their Concentrate is delivered in 60 gallon steel drums, specially coated inside.

For your information, duty will amount to about 4¢ per U. S. gallon, 3¢ per gallon Boiled Cider, and 1¢ for drums. Concentrate will be invoiced as Boiled Cider.

Samples of the new pack are on their way to us at this time and as soon as they arrive we will forward them to you. We will also advise price just as soon as we get it from them.

This is for your information.

Very truly yours, Tenser and Phipps, A. J. Phipps.

AJP:mc

[fol. 109

FTC—EXHIBIT No. 20

Docket No. 6484. May 10, 1956.

Western Union Telegram

WUH 4-23/18 NL

CNT KENTVILLE NS OCT 11

TENSER AND PHIPPS

QUOTE APPLE CONCENTRATE NEW PACK 36 BAUME \$1.30
 EX DOCK NEW YORK DUTY PAID 50 GALLON STEEL DRUM
 KOLDINSKY CANADA FOODS.

937PME

36 \$1.30 50

FTC—EXHIBIT No. 21

Docket No. 6484. May 10, 1956.

October 11, 1954.

J. M. Smucker Co., Orrville, Ohio

Attention: Mr. Paul Smucker

DEAR MR. SMUCKER:

We hope you can get something worked out with Tregunno at St. Catharines, Ontario on Grapes. Their telephone number is St. Catherine, Ontario, Canada, telephone Mutual 28631. This is a private line with Mr. Brunton or Mr. Ted Tregunno answering only and it could be a station-to-station call if you have any further interest.

On Apple Concentrate, \$1.35 per U. S. Gallon from New York Dock, duty paid in minimum carloads of 600 cans seems to be about the best so far.

There is a carry-over on Swiss Concentrate of about 250 steel drums quoted:

36 Baume about 67 brix at \$1.34

38 Baume about 71 Brix at \$1.41 $\frac{1}{4}$ 40 Baume about 75 Brix at \$1.48 $\frac{1}{2}$.

[fol. 110] This is per U. S. gallon, c. i. f. Atlantic port, duty paid.

Grapes: If it looks like you are going to buy either Juice, pulp or Stemmed and Crushed, we have a very good position and it is entirely possible we could confirm good juice for prompt shipment at 77¢ per gallon in 5 gallon tins.

Apple Chop: So far we have nothing new on this deal, but we do have an inquiry where the buyer tells us he uses a half-million pounds and if this is bought in the East, and I think it will be, it will no doubt strengthen the market considerably.

Understand your men were at North East last Friday and took with them samples of Pitted Grapes. Would like to know if the samples worked out ok? ?

Very truly yours, Tenser and Phipps.

FTC—EXHIBIT No. 22

Docket No. 6484. May 10, 1956.

October 13, 1954.

Canada Foods Limited, Kentville, Nova Scotia, Fruit Division, Phone 1100.

Apple Concentrate

GENTLEMEN :

We are pleased to offer you from the season 1954-1955 subject to prior sale:

Apple Concentrate 36 Be. depectinized, filtered and free of preservatives,

in steel lined drums 55-60 gallons	\$1.30
in oak wood barrels, 40-45 gallons	\$1.25
in 6 gallons cans	\$1.32

Price is per U.S. gallons, U.S. currency, C. I. F. New York, duty paid.

Delivery from November until February.

[fol. 111] Samples on request.

Yours very truly, Canada Foods Limited, Fruit Division, /s/ L. Koldinsky.

Lk/et

FTC—EXHIBIT No. 24

Docket No. 6484. May 10, 1956.

October 14, 1954.

J. M. Smucker Company, Orrville, Ohio

Attention: Mr. H. W. Kieffer

DEAR MR. KIEFFER:

Confirming telephone advices, the price on Pitted Concord Grapes for which we have you covered with Sunshine Packing Corporation is 15¢. If we can get your fast advices it is just possible that we might be able to get a slight reduction but not more than $\frac{1}{4}$ ¢.

We can offer top quality Grape Juice at 80¢ Westfield District and terms of storage for seller's account, payment $\frac{1}{2}$ July 1st, and $\frac{1}{2}$ September 1st storage until September 1st.

There are a few Stemmed and Crushed Grapes available and A. J. who is in the Westfield District tells us that no one is packing Stemmed and Crushed in that area. We have 165 barrels and 800 cans at 7- $\frac{1}{2}$ ¢ if you are interested.

In conclusion, we are offered Nova Scotia Concentrate in steel drums, 55 to 60 gallons per drum, 36 Baume at \$1.30 per U. S. Gallon, c. i. f. New York, duty paid delivery November until February.

Very truly yours, Tenser and Phipps, W. L. Lucas.

WLL:mc

[fol.112] FTC—EXHIBIT No. 25

Docket No. 6484. May 10, 1956.

October 15, 1954.

J. M. Smucker Co., Orrville, Ohio

Attention: Mr. H. W. Kieffer

DEAR MR. KIEFFER:

We are sending you under separate cover today a sample of Apple Concentrate put up by Canada Foods Limited, Kentville, Nova Scotia, which is offered at \$1.30 per U. S. gallon, c. i. f. New York, duty paid, delivery November until February.

Yours comments will be appreciated upon receipt of the sample.

Very truly yours, Tenser & Phipps, A. J. Phipps.

AJP:mc

FTC—EXHIBIT No. 26A

Docket No. 6484. May 10, 1956.

October 19, 1954.

J. M. Smucker Co., Orrville, Ohio

Attention: Mr. H. W. Kieffer

DEAR MR. KIEFFER:

Sorry we had to recall you on the phone today to give you detailed information with Mr. Koldinsky of Canada Foods Limited.

He tells us that there positively will be no lower price on Apple Concentrate with a possible exception of some carry-over, about 200 barrels, from Switzerland which is a year or two old.

Their only reason for making the price of \$1.30 per gallon is the fact that it is a government support proposition. They are taking business for shipment to February.

[fol. 113] 1st and guaranteed against their own decline prior to shipment.

This can be on an open account, returns to be in Canada in 14 days.

When their allotment of government stock has been completed, their cost will advance to a point that sales in the U. S. will be prohibited. In other words, they only have a limited amount of Concentrate to sell and everybody has said, who has had samples of it, that it is the finest stock that ever was made.

I do hope we can book you while they are still in a selling position.

Scotian Gold are the second largest producers in Canada but they still haven't been able to come up with anything less than \$1.35.

Mr. Koldinsky tells us that these barrels have an easy resale at \$5.00 per barrel in U. S. coin. They are lacquer lined, acid resistant.

If there is any further information you would like to have, we will be glad to give it to you.

FTC—EXHIBIT No. 26-B

Docket No. 6484. May 10, 1956

J. M. Smucker Co.

In the meantime, we feel this is a good bet and that no lower price will be made regardless of the Domestic situation.

Their capacity is 5000 gallons per day and this new plant has been in operation since 1950.

They have several thousand 6 gallon cans, but the price is \$1.32 per gallon. Barrels contain 55 to 60 U.S. gallons. This for your information.

Very truly yours,

Tenser and Phipps, A. J. Phipps.

AJP:mc

[fol. 114]

FTC—EXHIBIT No. 27

Docket No. 6484. May 10, 1956.

October 20, 1954.

J. M. Smucker Co., Orrville, Ohio

Attention: Mr. H. W. Kieffer

DEAR MR. KIEFFER:

Supplementing our letter to you last p.m. regarding Concentrate for the account of Canada Foods Limited.

We had a very pleasant visit yesterday from Mr. Koldinsky and he advises us that they have about 1,350,000 barrels of 135 pounds each of Apples still to process which is a subsidized deal with the Canadian government and when this deal is over, the price will no longer be available.

He showed us photographs of several thousand wooden barrels of Apple Concentrate going to South America and explained to us that this concentrate is finding a ready home among volume users.

I do hope you can get your mind made up to go along with this deal. Shipment one car prior to December 31st and the balance prior to February 1st, terms open account.

This Canadian Juice is no essence out and we find that with the Domestic Stock today there is practically no taste or flavor to this highly concentrated stock.

Mr. Koldinsky advises us that in their part of the country, these steel barrels second-hand are easily salable at \$5.00 per barrel. Thought you would like to have this information.

Very truly yours, Tenser and Phipps, A. J. Phipps.

AJP:mc. cc: Mr. Paul Smucker.

[fol. 115]

FTC--EXHIBIT No. 28-A

Docket No. 6484. May 10, 1956.

Canada Foods Limited, Fruit Division, Kentville—
Nova Scotia

Apple Concentrate—Apple Juice—Powdered and Liquid
Pectin

Phone 1100

October 25, 1954.

Tenser & Phipps, Commonwealth Building, Pittsburgh, Pa.,
U.S.A.

GENTLEMEN :

It was a real pleasure for me meeting you on my last visit to the United States. I really feel confident that we can do some nice business within the coming weeks.

Concentrate. As I already informed you before, we are willing to give you our brokerage for Concentrate of 4%. Prices for Concentrate 36 Bé, are as follows:

*delivered in steel drums	\$1.30
delivered in wooden barrels	\$1.25
delivered in 6-gals. cans	\$1.32

Prices are understood C.I.F. New York, duty paid. Payment 10 days after shipping date. Brokerage for you 4%.

We have inquiries at hand from some of our customers for prices f.o.b. station. For this reason we can give you special quotations for each order on request.

Under separate cover we forward to you some photos of our factory. For your information we are equipped with up-to-date modern machinery for processing Concentrate. For example we are using "Flash vacuums" where juice can be evaporated within 15 seconds by 110° F. Therefore flavor is guaranteed to remain in Concentrate.

We mainly are producing Apple Concentrate 36 Bé. In some special cases if customers are interested in Concentrate 38 Bé, or 71 Brix, price increases 15¢ per one gallon.

Our Apple Concentrate which is supplied from our factory is depectinized, filtered, and free of preservatives. Further to your letter of October 20, I am sorry to advise that I am unable to give you an option of 10 days for Smucker, covering 500 to 700 barrels. As I already informed you, the situation with regards to Concentrate does not look too bright, and prices are liable to rise,

FTC—EXHIBIT No. 28-B

Docket No. 6484. May 10, 1956.

October 25, 1954.

Tenser & Phipps,

For this reason I would appreciate your sending an acknowledgement by wire for each carload being sold by you.

Our next important product of our firm Canada Foods is apple juice. We produce apple juice only in 24/20-oz. cases or 12/48-oz. cases, using only lithographed cans. In order to give you an impression of our product we enclose a label being the exact picture of our lithographed cans. Prices for Apple Juice is:

24/20-oz. cans	\$2.90
12/48-oz. cans	\$3.10

All prices are understood C.I.F. New York, duty paid. A 4% commission is included for you.

Sliced Apples. This product is being processed at Berwick Fruit Products, Berwick, N.S. We contacted this firm, advising to forward details to you concerning this item.

Hoping our information will prove of some value to you, we remain,

Yours very truly, Canada Food Limited, Fruit
Division, /s/ L. Koldinsky,

LK/et

[fol. 117]

FTC—EXHIBIT No. 29

Docket No. 6484. May 10, 1956.

Western Union Telegram

October 26, 1954—840PME.

(Sent by Mr. Phipps by Phone)

DLPD

Konlinsi Canadian Food Products
Kentville, Nova Scotia

Smucker Orrville offer \$1.25 per gallon for 500 drums 36
Baume concentrate like samples submitted has been offered
this price shipment early January.

Tenser and Phipps, A. J. Phipps.

FTC—EXHIBIT No. 30

Docket No. 6484. May 10, 1956.

October 27, 1954.

J. M. Smucker Company, Orrville, Ohio.

Attention: Mr. H. W. Kieffer

DEAR MR. KIEFFER:

As per my telephone conversation with you today, Mr.
Koldinsky called from Kentville. He merely said that the
price was a government price and there was nothing that
could be done about it.

He has a base price, plus freight to Eastern Seaboard,
plus brokerage and that is it.

We could confirm the order at the price of \$1.25, but we
are very much afraid that we would be right in the way of
the Robinson-Patman Act and we might find our names in
print.

It would be a feather in somebody's cap to decorate us
with the violation and further, we do not believe that you

Mr. Macdonald:

Q. What was the period when you couldn't say who owned the apples?

A. Sometime about the 1st week in October.

Mr. Orlinsky continues:

Q. Mr. Koldinsky, after the government was able to give you prices were you able to get your normal supply of apples?

A. Yes, the government would ship the apples to our yard without any price. The price was made later through a government commissioner who came here.

Q. The apples that the Government shipped to you were they the kind of apples that you had ordered?

A. The government shipped the apples to Canada Foods without regard to quality, they dumped them on us.

Q. Did you have more apples than usual for processing at that time?

A. No more than in 1950.

Q. If the government had not subsidized the apples in 1954 would you have bought more or less?

A. I would have bought the same quantity.

Q. When did Henry Broch first start to sell apple concentrate for you?

A. I believe he started with a small order after our first visit. I am not sure.

Q. Did Henry Broch sell any apple concentrate for you in Orrville, Ohio to your knowledge to John Smucker Company?

A. Yes.

Q. Was that pursuant to an order Mr. Broch wrote up?

A. (No answer).

Q. How much concentrate did he sell for you on his first order?

A. About 500 drums, that was my biggest order in the United States.

Q. Was that order written up about October 27th, 1954.

A. I am not sure.

Q. Did you have any conversation or correspondence with Mr. Broch prior to the time he wrote the order for Smucker?

are the kind of folks that would want to go along with a deal of this kind knowingly.

Frankly, we do not know how to handle the situation. [fol. 118] We do hate to lose the business, but there is nothing that we can put together that will come up with the right answer and leave us with clean slates, all of which we regret exceedingly.

Thanks for being so nice to me while paying you a visit yesterday and I hope it will not be too long before I can again come out to see you.

Yours very truly, Tenser and Phipps, A. P. Phipps.

AJP:mc

P. S. Note we have given Paul an option on 3000 tins of Grapes up to and including Monday, November 1st.

FTC—EXHIBIT No. 31

Docket No. 6484. May 10, 1956.

October 29, 1954.

Canada Foods Limited, Kentville, Nova Scotia

Attention: Mr. L. V. Koldinsky

DEAR MR. KOLDINSKY

We acknowledge your wire telling us to stop selling Concentrate for one week.

We do not know how to talk to you regarding this Smucker deal on the 500 barrels. We do hope the buyer's position is legal. The Robinson-Patman Act prohibits remittance of brokerage to the buyer and they are always looking for some publicity with larger concerns.

All we want to know is that your price quoted to other brokers was the same as that given to us.

We had hoped to do a great big business with you folks, but on the basis of what has happened on this deal, we feel that our hands are more-or-less tied, because it has not been our custom to work with unclean hands.

[fol. 133] A. Yes, Mr. Broch called me that Smucker would like to buy 500 drums, but he would like to pay \$1.50 F.O.B. New York duty, provided that they are able to give him a price of \$1.25 as much as he would have to pay in France or Europe. He told me this on the phone and I told him I would call him later; and I called him back. I don't know whether it was the same day or the next morning. I called him back saying it was O.K. provided it was shipped via New York by boat, commission 3%. I give him permission to sell on these conditions.

Q. Before you received the Smucker order, did you have any conversation with Mr. Broch.

A. A week or 10 days before October 27th, 1956.

Q. Prior to the time Henry Broch first called you confirming the Smucker order and the time the order was written up, how many conversations did you have with Mr. Broch?

A. (1) He called me saying he can get price. (2) I called him to O.K. on this and this condition.

Q. You mentioned that Henry Broch said that Smucker was able to buy the French Concentrate in the United States at \$1.25 per gallon?

A. Yes.

Q. Now between the time Henry Broch phoned and the time you gave him an answer, you made certain calculations? Are these the calculations you arrived at earlier?

A. That is the calculation I do in extra business.

Q. What do you call special or extra business?

A. They offer me a cheaper price.

Q. When Henry Broch called you the first time regarding the Smucker order, did he ask you or suggest to you that you cut his commission?

Mr. Ragsdale objects to question being highly leading, suggestive, improper, and putting words in his mouth.

Mr. Orlinsky continues:

Q. When Mr. Broch phoned you regarding the Smucker order, did he raise any point regarding the rate of commission?

A. No.

Please advise us if the Sunshine shipment of 50 wooden barrels is getting off on the boat leaving October 30th to New York.

Very truly yours, Tenser & Phipps, A. J. Phipps.

AJP:mc

[fol. 119]

FTC-EXHIBIT No. 33

Docket No. 6484. May 10, 1956.

Canada Foods Limited, Fruit Division
Kentville—Nova Scotia

Apple Concentrate—Apple Juice—Powdered and liquid
pectin

Phone 1100

November 17, 1954.

Tenser & Phipps, Commonwealth Building, Pittsburgh,
Pa., U.S.A.

Attention: Mr. J. Phipps

DEAR MR. PHIPPS:

Further to your letter of November 15th, please be advised that prices are unchanged.

\$1.30 per U.S. gallon of Apple Concentrate delivered in steel drums.

\$1.25 per U.S. gallon of apple Concentrate delivered in wooden barrels.

Prices are understood C.I.F. New York, duty paid, for shipment via steamship.

All Concentrate is for shipment end of March.

Yours very truly, Canada Foods Limited, Fruit
Division /s/ L. Koldinsky.

LK/et

[fol. 120]

FTC—EXHIBIT No. 34

Docket No. 6848. May 10, 1956

Canada Foods Limited, Kentville, Nova Scotia,
Fruit Division

September 29, 1954.

Tinsler & Phipps, Pittsburgh, Pa., U.S.A.

GENTLEMEN:

Thank you very much for your wire of September 22nd, addressed to our parental firm, M. W. Graves & Co., Limited, Berwick, N. S. concerning Concentrate.

We are processing apple Concentrate in a large scale and we would be very glad to get into business relations with your firm. May we point out that we are especially equipped for processing of Concentrate and use tin layer evaporators. Concentrate in our factory is produced continuously by 110° F. within only a few seconds.

Under separate cover we forward to you a few samples of our Concentrate 36Bé.

Prices for this season have not been settled as yet, but we hope to have them at hand within the next five or six days, and we will wire prices to you immediately afterwards.

Apple Concentrate 36Bé is delivered in 60-gallons steel drums specially coated inside. We will offer prices C.I.F. [fol. 121] New York. For your information duty will amount to about 4¢ per U.S. gallon. 3¢ per one gallon boiled cider and 1¢ for drums. Concentrate will be invoiced as boiled cider. Prices submitted will include a 4% commission for you.

With the hope of being able to forward quotations to you as soon as possible, we remain.

Yours very truly, Canada Foods Limited, Fruit
Division. /s/ L. Koldinsky.

LK/et

[fol. 122]

FTC—EXHIBIT No. 35-A

Docket No. 6484. October 3, 1956

Copy

Mr. Otto W. Cuyler, Webster, N.Y.

October 25, 1954.

DEAR MR. CUYLER,

It was a real pleasure for me meeting you on my last visit to the United States.

Herewith I allot you the New York States including New York City as your exclusive territory for selling apple concentrate for the period of one year, subject to prolongation if both parties are satisfied.

As I already informed you previously, we are especially equipped for the processing of apple concentrate and we only bring products of first class quality on the market.

Our Apple Concentrate is filtered, depectinised and free of preservatives. Prices for Concentrate 36 Baume, are as follows:

Delivered in steel drums	\$1.50
Delivered in wooden barrels	\$1.25
Delivered in 6 gallon cans	\$1.32

For your information we are afraid that prices are not stabilized as yet and therefore would appreciate receiving an acknowledgment by wire for each carload being sold.

We mostly are processing Apple Concentrate 36Bé. In case customers are interested in Apple Concentrate 38' Bé or 71 Brix, we are in a position to supply Concentrate for the increased price of 15¢ per gallon. All prices are calculated C.I.F. New York, duty paid. Of course we are able to offer our product from any station in the United States, delivery by rail, just for your information. We received a wire from you dated October 22, with order for 500 cans Apple Concentrate for Fruit Crest Corp., and 100 cans for Farmers Friend. Both deliveries to be made in February. We presume that we can ship this order per one carload since our prices are calculated for carload shipments and custom clearing should be done the same way too. There is an expense of \$12.00 charged by custom brokers regardless as to whether shipment consists of one or 10,000 cans.

[fol. 123] As I informed you, I visited the Borden Co., Mr. Morse, and he was interested in 150 barrels Apple Concentrate for his factory in Syracuse. On Saturday we wired to him as follows:

"Offer Apple Concentrate 38 Be, in 60 gallon steel drums \$1.52 per gallon 150 barrel lot. Station Syracuse duty paid. For delivery until February 1955".

FTC—EXHIBIT No. 35-B

Docket No. 6484. October 3, 1956.

October 25, 1956.

MR. OTTO W. CUYLER

I would appreciate your getting in contact with Mr. Morse in order to complete this business. Just for your information this firm is an old customer to us.

I am in receipt of your wire which was sent to me by the Poole Company in Boston. I am quite confident now that this matter is settled, since Mr. Broch is informed by us to limit his sales on his very district, and that New York State as well as New York City are the exclusive territory of one of our brokers.

I wish to extend to you and your wife my sincerest thanks for the wonderful reception I received during my stay in Webster.

I hope that this is the start of a profitable business in your territory.

Yours very truly, Canada Foods Limited, Fruit
Division, L. Koldinsky.

LK/et

FTC—EXHIBIT No. 36

Docket No. 6484. October 3, 1956.

April 21, 1954.

Copy

Henry Broch & Company, Hyde Park National Bank Building,
1525 East Fifty Third Street, Chicago, 15, Illinois.

[fol. 124] GENTLEMEN:

Thank you very much for your letter of April 15th concerning Apple Concentrate.

We are looking now for an agent for Concentrate in Central America and I hope we can work together.

We have left on hand about 300 barrels of Apple Concentrate 36.5 Baume—50 gallons in each barrel (600 lbs.).

The price is \$1.85 per United State gallon f.o.b. Halifax.

In summer we supply Concentrate in steel drums inside lined with special lining.

In this price is included 5% commission for you.

We are not able to send any Concentrate on brokerage stock. We are not able to ship by waterway in winter. I am of the opinion that from Chicago we can send Concentrate by waterway, of course only in summer.

We will ask today about rates and will inform you in the next few days about the freight from Halifax to Chicago.

We will send you separately a sample of our Concentrate.

Yours very truly, Canada Foods Limited, Fruit
Division, L. Koldinsky.

LK/ejb

RESPONDENT—EXHIBIT No. 1.

Docket No. 6484. October 3, 1956.

UNITED STATES OF AMERICA BEFORE FEDERAL TRADE
COMMISSION

In the matter of Henry Broch and Oscar Adler, copartners
trading as Henry Broch & Company

Mr. Orlinsky's Statement:

Will you let the records show that this is a deposition being taken from Mr. Ladislav Koldinsky. The deposition is to be read in evidence in the matter of Henry Broch and [fol. 125] Oscar Adler, doing business as Henry Broch Company, before the United States Federal Trade Commission pursuant to motion filed by counsel for respondents and pursuant to an order of John Lewis, Hearing Examiner, granting said motion. All of which is in accordance with and pursuant to the provisions of Section 3.12 of the rules and practice and procedure of the Federal Trade Commission and that the depositions as taken before Mr. Webster Macdonald, a Notary Public within and for the Province of Nova Scotia, Canada at Kentville, Nova Scotia on the 6th day of August, A.D., 1956 at the hour of 10:00 a.m. Present at the hearing are Mr. Harold Orlinsky, counsel for Respondents; Mr. Edward S. Ragsdale, counsel supporting the complaint and Mr. John Lewis, Hearing Examiner for the Federal Trade Commission.

Ladislav Koldinsky—sworn as witness:

Mr. Orlinsky examining:

Q. Will you state your name?

A. Ladislav Koldinsky.

Q. State your residence?

A. 42 Hillside Avenue, Kentville, Nova Scotia.

Q. What is your business or occupation?

A. Manager of Canada Foods.

Q. Canada Foods Limited?

A. Yes.

Q. How many divisions?

A. Two divisions—fruit and pickle.

Q. Both are in Kentville?

A. Yes.

Q. How long have you been manager of the fruit division?

A. From 1950 until the present-time.

Q. You are also a chemist?

A. Yes.

Q. Food chemist?

A. Yes.

Q. What particular type of food products does Canada Foods manufacture?

A. Apple juice, apple concentrate, apple pectin.

Q. Is there any difference between apple concentrate and apple cider?

A. Yes, apple concentrate is evaporated apple cider in ratio 1 to 6, 1 to 7.

[fol. 126] Q. You sell apple concentrate in the United States?

A. Yes.

Q. You also export to other countries?

A. Yes, South America and Mexico.

Q. No export to Europe?

A. No.

Q. In the United States in the sale of apple concentrate, are you represented by fruit brokers?

A. Yes, we are.

Q. In the year 1954 how many fruit brokers represented your Company and sold apple concentrate in the United States?

A. In 1954 we had a few brokers, Broch, Poole & Company in Boston, Cuylar in Webster, New York State and Tenser & Phipps in Pittsburgh.

Q. Mr. Koldinsky did any of these brokers in 1954 have exclusive territory?

A. Poole is from Massachusetts and East; Cuylar is New York State; Tenser & Phipps is Pennsylvania; Broch the rest of the country.

Q. Mr. Koldinsky, how are these brokers compensated on sale?

A. They are paid under percentage brokerage fees.

Q. By percentage price or percentage on sales price?

A. On sales price they make a commission.

Q. Who pays the commission?

A. Canada Foods.

Q. These brokers are agents of yours?

A. Yes, brokers receive no commission from the purchaser.

Q. Did all your brokers that you had in the United States in 1954 receive the same rate of commission?

A. No.

Q. How did the commissions vary?

A. Commission is from 3-5% in the United States and 10% in South America.

Q. What determines the commissions you paid the brokers?

A. We establish a price and brokerage. We change the brokerage from time to time according to the markets of fresh fruit and market of finish product. Each order is subject to confirmation.

Q. Confirmation as to what?

A. Confirmation as to price, shipping and sometimes the commission.

Q. You stated that the brokerage varied. Assuming the market conditions were the same what determined what one [Vol. 127] broker's commission is as against what another broker gets?

A. That depends on the markets and on the broker himself:

(1) Mr. Broch gets more commission than other brokers because we started to make a business in Central United States and

(2) He does more business than the other brokers.

Q. Do you mean by that, Mr. Koldinsky, that of all the brokers that you had in the United States in 1954 only Mr. Broch had an arrangement with you where he would stock your merchandise in advance of any sales.

A. Yes.

Q. And because of that you were willing to pay more commission to Mr. Broch?

A. Together with the mid-west market.

Q. Did you in 1954 ever enter into a written contract with your brokers?

A. We have no written contract with any broker.

Q. Now getting down to any particular broker, does the commission ever vary or does the commission always stay the same?

A. The commission varies from time to time according to quantity and price.

Q. How does commission vary as to quantity?

Objection—Mr. Ragsdale—The question is a leading question.

Mr. Orlinsky continues:

Q. How do you determine the commission?

A. Sometime with big orders we have to compete with European competitors, sometimes the brokers call me and say I can get a big order if he can compete with the European competitors and sometimes United States competitors.

Q. As I understand it up to this point your brokerage varies according to the size of the order. Would market conditions have any effect on brokerage?

A. Brokerage is made according to calculations.

Q. Tell us how you calculate?

A. (1) I check if it is a true order for competitors price.

(2) I check my raw material.

(3) I check how big is the order involved.

(4) I make calculations how much cheaper I can get [fol. 128] containers, freight, duty and shipping, and how much I can save on processing a bigger order. I prefer an order at the time when I can get the raw materials. I try to cut the commission because if everything is cheaper the commission should be cheaper too. After I make these calculations I call the broker saying I am willing to sell for this price under this and this condition.

Q. We have referred to large orders as opposed to small orders, what do you consider large orders?

A. Concentrate 300-5—drums. The drum is 60 gallons. I do not make these calculations on special price on a small order because I cannot save anything on a small order.

Q. I would like to know your method of operation. Do you start processing your new crop in October?

A. In October, yes, depending on the weather.

Q. Do you process your entire produce in October for the whole season, or do you make your concentrate as the orders come in?

A. We make our concentrate at one time. October to December, regardless of orders.

Q. Do you fill your drums at one time for delivery?

A. We fill the concentrate in storage tanks 5000 gallon storage tanks.

Q. During the season, if you should run out of concentrate, do you make any more?

A. No, we have no apples. Making apple concentrate is a special kind of business. I like to sell $\frac{1}{3}$ of it before the season, and $\frac{1}{3}$ during the season, and $\frac{1}{3}$ I hold for later orders.

Q. Are you always able to dispose of the $\frac{1}{3}$ you hold for later orders?

A. Yes, because many of my customers need more than the orders in October and November.

Q. Is there ever a situation that you are unable to dispose of all the apple concentrate you hold for later orders?

A. No, I sell it every year.

Q. Do you ever have to drop your price in order to sell all of it?

A. Yes, if there is a big crop I may have to drop my price.

Q. You spoke about competitors, where are your competitors?

A. We have competitors in Kentville, United Fruit, and [fol. 129] also in the United States. Our biggest competitors are from Europe.

Q. What countries?

A. France, Switzerland, and Holland.

Q. How does the French produce compare in quality?

A. Only France has two types of concentrate—

Mr. Ragsdale objects—these questions are irrelevant and immaterial.

Mr. Koldinsky continues:

A. (1) Sweet, which has no big value, and is not exported.

(2) Sour which competes with our quality.

Q. I want to get to some of the items you mentioned that you take into consideration when you make your calculations. You mentioned containers, how does that enter into your calculations?

A. If I buy a bigger quantity of containers I get a cheaper price and I can get cheaper freight.

Q. Are you referring to freight on empty containers?

A. Yes, coming to Kentville.

Q. How much of a saving are there on bigger orders?

A. 70¢ to 50¢ per barrel.

Q. How many containers do you stock in your plant?

A. That depends, between 500 to 5000.

Q. What is the saving in freight?

A. Bigger tonnage, cheaper freight.

Q. How is the duty determined on larger orders as against smaller orders?

A. Duty is the same if you send 5 gallons or 5 million gallons.

Q. By duty do you refer to custom entry?

A. I mean the expense of clearing the produce entering United States.

Q. If you had an order for 50 drums which you shipped what would the custom entry be?

A. About \$24.00 on 50 drums.

Q. If you had an order for 500 drums what would the custom entry be for that?

A. \$24.00.

Q. You mentioned also you had a saving on processing when you have large orders. How does that come about?

[fol. 130] A. That is the biggest saving.

Q. Can you explain how that is a saving?

A. If I get an order for 500 barrels of concentrate I know for sure I have this concentrate sold, and I do not have to wait until season time, and if the order comes in time I can get apples, I buy apples. I can process more than the 500 drums by the same overhead. The other saving is by filling the barrels. We have a special equipment for filling. This equipment has to be washed after each filling. If we fill

five barrels or 500 barrels we have to wash each time after filling.

Q. Does that require manpower?

A. Yes.

Q. Mr. Koldinsky are you familiar with Henry Broch & Company?

A. Yes.

Q. Do you know Mr. Henry Broch of that Company?

A. Yes.

Q. When did you first start doing business with Henry Broch & Co.?

A. In the Spring of 1954.

Q. Were you in the United States in July of 1954?

A. Yes.

Q. At that time in July of 1954 did you visit Mr. Broch in Chicago?

A. Yes at his office.

Q. Did you then discuss with Mr. Broch if he would represent you as a broker?

A. Yes.

Q. Did you discuss the selling of apple concentrate for you?

A. Yes.

Q. In July of 1954 was that the first time you met Mr. Broch?

A. Yes.

Q. Did you have any correspondence prior to the time you met him in Chicago?

A. Yes.

Q. What was the occasion for such correspondence?

A. Before I came to him I had Mr. Broch recommended to me by our Manager, Mr. Fejtek, the manager of the pickle plant at some convention.

Q. Mr. Koldinsky, in June of 1954 when you were in Mr. Broch's office did you then discuss with Mr. Broch the size of the orders he would be able to sell for you?

A. Mr. Broch told me he had a few customers for concentrate and he can sell a few thousand barrels of concentrate, but we didn't talk about payment or to whom we would sell. We discussed the agency fee.

Q. At that time in July 1954 when you discussed the general picture with Mr. Broch, did you then contemplate that he would be able to sell 500 drums at a time for you?

A. No.

Q. Was he not of the opinion that no customer could use 500 barrels of concentrate?

A. (No answer).

Q. You state that you did not discuss commission?

A. Yes.

Q. At that time did you tell him what commission you would pay him?

A. At that time I told him I would pay him 5% on a normal order and this would be subject to confirmation.

Q. You stated before that you normally manufactured apple concentrate in October?

A. Yes.

Q. Do you recall in 1954 when you were first able to quote prices?

A. I can't remember.

Q. I am referring to prices on a new crop.

A. About the middle of October, I believe, I don't know exactly.

Q. When are you able to quote prices? Did you send out a written price list to different brokers?

A. I visited the brokers in the fall of 1954.

Q. In the fall of 1954?

A. Yes, in the fall of 1954 I visited Mr. Broch, the next day Mr. Cuylar, and the next day Mr. Phipps in Pittsburgh and the next day Mr. Wood of the Poole Company in Boston.

Q. Did you also visit Mr. Phipps in July of 1954?

A. No.

Q. At that time in the fall of 1954 what was the situation with regard to the supply of apples in Nova Scotia? Were they plentiful?

A. In September of 1954 we had a hurricane, it blew down 50% of all apples and the government made a provision to subsidize the apples and it took about three or four weeks before we found out who was the owner of the apples and what the price would be.

Q. During this 3 or 4 week period were you unable to quote prices?

[fol. 132] Mr. Ragsdale objects as to time being indefinite.

[fol. 134] Q. When was the first time there was any mention as to cut of commission?

A. By accepting this order I gave him commission of 3%. That was a condition for this order.

Q. Did the suggestion for the cut in commission come from you or Mr. Broch?

A. It came from me because I made the calculations.

Mr. Lewis:

Q. Did the suggestion for the reduction of commission of 3% come from you for the first time after you made the calculations?

A. Yes, that was the second telephone call I accepted the order on this condition, shipping by water rate to New York commission 3%.

Q. When Mr. Broch called you the previous day or earlier that day, you made certain calculations in which you apparently decided you could sell at that price \$1.25 provided you didn't have to pay a 5% commission. You had to save 5¢ part of the saving of 5¢ a gallon consisted in your calculations of a 2% reduction in commission. By a 2% reduction in commission together with other savings you concluded you could sell for \$1.25.

Mr. Orlinsky continues:

Q. Other than the Smucker order what was the next largest order Mr. Broch was able to sell for you?

A. The next largest order was 50 drums.

Q. You testified that Tenser & Phipps were also brokers for you?

A. Yes.

Q. When was the first time Tenser & Phipps started to represent you as a broker?

A. It would be about the end of September in 1954 immediately after the hurricane.

Q. Did Tenser & Phipps sell any apple concentrate for you?

A. Yes, they sold some in 1954.

Q. How much did they sell for you in 1954?

A. 300 to 400 drums, I am not sure.

Q. Did any one from Tenser & Phipps communicate with you by telephone or by other means of communication

regarding the sale of apple concentrate to Smucker & Company?

[fol. 135] A. Yes, about 3 to 4 days after I discussed it with Mr. Broch a call came from Mr. Phipps. I was a little surprised because I don't like two offers to come from our company to the same customer through two different brokers. Mr. Phipps asked if I could give him \$1.25 for Mr. Smucker. I refused to take this order. I ask \$1.30 because I know that this order is taken by Mr. Broch, Mr. Phipps is to represent us in Pennsylvania and Smucker is not in Pennsylvania but in Ohio.

Q. Did you tell Mr. Phipps that you could not sell for less than \$1.30, unless the brokerage was cut.

Mr. Ragsdale objects as a leading question.

Mr. Orlinsky continues:

Q. When Mr. Phipps called you with reference to the Smucker order do you know if anything was said with regard to commission.

A. Mr. Phipps told me if I was not willing to sell for \$1.25 he will not get this business. I can't help it, the price is \$1.30.

Q. Was anything said at that time with reference to commission by any one of you?

A. No.

Q. Is your answer no, or you can't remember?

A. No, nothing was said.

Q. What was the reason for your telling Mr. Phipps that the price could not be cut below \$1.30?

A. Because I know I can't make this business, because the business was made the day before by Mr. Broch.

Q. I show you a photostatic copy known in these proceedings as Federal Trade Commission Exhibit #31 purporting to be a letter dated October 29th, 1954 from Tenser & Phipps to Canada Foods Limited addressed to Mr. Holden and attention Mr. Koldinsky and I ask you whether this letter was ever received by you.

A. Yes.

Q. In paragraph three of this letter I refer to a sentence as follows: "all we want to know is that your price quoted to other brokers was the same as that given to us", and I

ask you whether you ever answered that question by letter or otherwise?

A. I don't believe I have answered this letter because I read this letter for the first time Saturday on August 4th, 1956. I believe this letter came in October 29th, 1954. [fol. 136] It is my biggest season. All the letters in my file have my stamp, but if anybody from another broker sent a letter like this I will sell him no more concentrate.

Mr. Ragsdale Cross-examining

Q. Mr. Koldinsky over what period of time does Canada Foods keep records with reference to transaction of business done in the United States.

A. From 1950 on.

Q. Are your records intact concerning your Canada Foods business dealings with or through the various brokers in the United States for the year 1954 to 1955?

A. Yes.

Q. Do you have records of telephone calls made and charged to Canada Foods for 1954 and 1955?

A. No record of telephone calls.

Q. Do you have bills of calls made to Pittsburgh and Chicago and other places?

A. Yes.

Q. Do you have records of your correspondence with Henry Broch and Company from July of 1954 to March of 1955?

A. Yes.

Q. Will you bring these records with you this afternoon.

A. Yes.

Q. Do you have records and correspondence from Tenser & Phipps for the same period of time?

A. Yes.

Q. Do you have records for the same period of time re your broker Cuylar and Poole in Boston?

A. Yes.

Q. Will you produce these records for the period I have requested?

A. If I can.

Q. Is there any reason why you cannot produce them if they are all in the file.

A. My office manager is away.

Q. Will you bring records of Canada Foods, telephone bills at least covering the United States calls to your brokers, the ones previously named, Tenser & Phipps, Henry Broch and Company, Cuyler & Poole?

A. No because the office manager is on vacation.

Q. Will you produce a record showing your brokerage payments to each of your brokers, Henry Broch, Tenser & Phipps and each of the other firms named?

A. When my office manager comes home from vacation.
[fol. 137] Q. Who is your office manager now in charge?

A. Mr. Shaffner.

Q. Can Mr. Shaffner authorize you to produce these records?

A. I will try.

Q. Will you bring the brokerage statements for each of the brokers for the period stated?

Mr. Lewis:

As I understand it, he is going to ask you some questions with regard to your relationship with Henry Broch and Company as well as the other brokers which you have named as your brokers. We assume you will not be able to give him definite answers. He wants you to try to get all the information you can get together over the noon hour. If you can't get it over the noon hour report back and tell us so.

Court recesses from 12:30 to 2:00 p.m.

Cross-examination continues.

By Mr. Ragsdale:

Q. Over what period of time have you been manager of the fruit division of Canada Foods Ltd.?

A. From 1950.

Q. What are the duties of the manager of this division?

A. Processing manager and exporting.

Q. Who determines the prices of the products which Canada Foods sells.

A. Myself, exclusively.

Q. Do you determine the prices of the products sold to all your customers in the United States.

A. Yes.

Q. Are products sold to customers in the United States direct or through brokers?

A. Yes, I can't remember, but maybe yes.

Q. If I understood you correctly this morning, you said you had four brokers in the United States.

A. Yes, in 1954.

Q. How many did you have in 1955?

A. The same, maybe less, no more, I can't remember.

Q. Who made the arrangements with Henry Broch and Company to represent Canada Foods on a brokerage basis.

A. Myself.

Q. Did anyone else have anything to do with such arrangements?

A. No.

Q. Did you state this morning that you appointed Henry Broch as broker for Canada Foods in July or August of 1954?

A. Yes.

[fol. 138] Q. Is it not true Mr. Koldinsky that on your return to Kentville after making verbal arrangements with Mr. Broch that you wrote him a letter thanking him for courtesy extended and confirming brokerage arrangements in writing?

A. Yes, that is my normal procedure.

Q. Mr. Koldinsky, you state that that was the usual arrangement, that after appointing a broker, on your return to Kentville you confirm it in writing?

A. Yes I usually do it.

Q. That correspondence is of course in the files of Canada Foods?

A. I suppose so I never looked for it.

Q. When did you make arrangements with Tenser & Phipps to represent Canada Foods as a broker?

A. Later about September of 1954.

Q. Do you recall writing a letter to Tenser & Phipps outlining the brokerage arrangements and the rate of the brokerage to be paid.

A. I believe yes, it is my rule.

Q. When was Cuylar appointed as a broker for Canada Foods?

A. In the same period as Tenser & Phipps.

Q. Did you likewise write to Cuylar on your return to Kentville confirming the brokerage arrangements?

Mr. Orlinsky: —I object to that.

Mr. Lewis: During the taking of the depositions objections are inserted for the record and the depositions can be read into the record at the next hearing.

Mr. Orlinsky: I prefer to hear Mr. Lewis the Examiner rule on the procedure.

Mr. Ragsdale: I prefer to have the depositions read into the record.

Mr. Lewis: In view of the disagreement on this subject I will be unable to make any ruling. Whatever ruling I would make outside the jurisdiction of the United States would have to be confirmed by the parties hereto.

[fol. 139] Mr. Ragsdale:

Q. I hand you a two-page letter, Mr. Koldinsky, dated October 25th, 1954, having been stamped with a letter "K" on the front page, and addressed to Mr. O. W. Cuylar, Webster, New York. Is this the letter you wrote Mr. Cuylar after making the brokerage arrangements with him?

A. Yes, that is the letter.

Q. Will you produce this letter and turn it over to the secretary?

A. Yes.

Mr. Ragsdale: Mr. Macdonald and Mr. Lewis, I have in my hand a letter dated October 25th, 1954, which is a two page letter addressed to Mr. O. W. Cuylar of Webster New York, bearing the signature L. Koldinsky which I propose to offer in evidence at the next formal hearing and I would like to have it attached to or with the depositions so it can be read at the next hearing in the United States at that time. I request that the document be marked Commission Exhibit 35 A & B.

Mr. Lewis: Since this is not a formal hearing, but the taking of a deposition I cannot, of course, rule on the admissibility of the document at this time, and I will rule on it at the next formal hearing of these proceedings or at such other time as counsel sees fit to offer. However, I would like to ascertain as to whether there will be any objections to this document on the grounds other than irrelevancy or materiality, and if there will be any objection to the document on the grounds that it has not been properly authenticated.

Mr. Orlinsky: My objection will come on the grounds of irrelevancy and materiality and I make no objection to the authenticity of the document.

Mr. Ragsdale: I will ask you Mr. Koldinsky if you will examine your file and find a similar letter which you wrote to Henry Broch and Company or to Mr. Henry Broch confirming the brokerage arrangements, said letter being written on or about September or October of 1954.

[fol. 140] Mr. Orlinsky objects—I object to Mr. Ragsdale going through Mr. Koldinsky's correspondence.

Mr. Ragsdale: At the next hearing I am going to request that a letter dated April 21st, 1954 to Henry Broch and Company beginning "Thank you very much for your letter of April 15th concerning apple concentrate", this is a two page letter, and I ask that it be marked 36 A and B. I am likewise going to ask that a letter dated May 5th, 1954 to Canada Foods Limited, a one page letter, attention Mr. L. Koldinsky and signed Henry Broch and Company bearing the signature Henry Broch appear thereto by offering it in evidence as No. 37.

Q. Mr. Koldinsky, you will find a similar letter to your brokers Poole & Company?

A. I can't find it because Poole worked with us before 1950.

Q. Do you have your brokerage statements to Henry Broch and Company for the period stated.

A. No.

Q. Why?

A. I have only one secretary, she is not able to make it. Brokerage is made from the office and the Manager is away.

Q. When will your office manager return?

A. Monday.

Q. Can you get the records by tomorrow?

A. I will try.

Mr. Lewis: If you, Mr. Ragsdale, could limit this to some definite period of months so Mr. Koldinsky will be able to produce these records in the absence of his manager.

Mr. Ragsdale:

Q. Were Canada Foods new prices on apple concentrate in October of 1954 announced at the same date, or the same

approximate date, to all your brokers in the United States?

A. I believe, yes.

Q. Were the same prices quoted to all the Canada Foods brokers in the United States?

A. I believe, yes.

Q. Were the same prices quoted to all of the Canada Foods brokers in the United States for apple concentrate in October of 1954?

A. Yes.

Q. Do you recall what Canada Foods quoted new prices were on apple concentrate in steel-lined drums containing [fol. 141] 55-60 gallons in October of 1954?

Mr. Orlinsky: I object—My objection is that Mr. Koldinsky's testimony would not be the best evidence. The best evidence would be the letter in which he quoted prices.

Mr. Ragsdale: If your Honour please, I am simply cross-examining on Document 31 which is a letter from Tenser & Phipps to Mr. Koldinsky asking whether all the prices quoted were the same. I just wanted to see what his recollection was.

A. I believe, yes, the prices were the same.

Q. Was it the policy of Canada Foods in October of 1954 to discriminate in price between its different customers located in the United States who purchased apple concentrate?

Mr. Orlinsky: I object to that.

Mr. Lewis: The question is not an apt question, and you will have to change your terminology.

Mr. Ragsdale:

Q. Is it not true that it was the policy of Canada Foods in October of 1954 to charge different prices to its various customers in the United States who purchased apple concentrate?

A. They get the same price, the base price is the same, but sometimes the freight rates make the difference in prices.

Q. Is it not true Mr. Koldinsky, that in 1954 in October, you quoted a price F.O.B. New York duty paid to all customers?

A. Yes.

Q. You paid the freight to New York to various customers' places of business.

A. The customers pay the freight but sometimes we have to quote prices F.O.B. customers delivery point.

Q. Mr. Koldinsky, is it not true that on about October 19th, 1954 you called on Mr. A. J. Phipps of Tenser & Phipps in Pittsburgh in his office?

A. Yes.

Q. Is it not true that on this occasion you advised Mr. Phipps that the only reason Canada Foods could make a [fol. 142] price of \$1.30 per gallon was due to the fact that it was a government subsidy or support proposition?

Mr. Orlinsky: I object to the form of the question.

Mr. Ragsdale: That statement is a fact, is it not?

Mr. Koldinsky: I can't remember that I told Mr. Phipps, but I believe I told him that the whole apple crop in the Annapolis Valley was purchased from the Government, that is the reason why I will make this price on concentrate.

Q. Do you recall Mr. Phipps informing you that he was endeavoring to sell a substantial quantity of apple concentrate to J. M. Smucker Company of Orville, Ohio?

A. I remember talking to Mr. Phipps, but I don't remember the name of the firm we talked about. We talked about some firm in Pittsburgh by the name of Luftz Schraume.

Q. Do you recall sending a sample of apple concentrate to Mr. Phipps for use in soliciting business?

A. Yes, I recall sending a sample to Tenser & Phipps for this purpose.

Q. Do you recall advising Mr. Phipps that when Canada Foods allotment of Government stock of apples had been completed that Canada Foods costs would be advanced.

A. I did not tell him that because all of the apples in Nova Scotia were owned by the Government and when the supply was used up it would not be a question of the price being higher or lower because there would not be any more apples.

Q. Mr. Koldinsky I hand you Commission Exhibit 29 which is a telegram from A. J. Phipps addressed to Canada Foods, dated October 26th, 1954. Do you recall receiving it?

A. I do not recall receiving it, but I will look in the

correspondence. Yes, I have the original of the telegram in the file.

Q. Do you have a reply in your file to this telegram?

A. I can't find any reply to the telegram in my correspondence.

Q. Will you now Mr. Koldinsky examine your telephone bills to see if you called Mr. Phipps on October 26th or October 27th, 1954.

A. From the records established I do not seem to have it.

[fol. 143] Mr. Orlinsky: I am admitting that there was conversation between Mr. Koldinsky and Mr. Phipps.

Mr. Ragsdale:

Q. Mr. Koldinsky, within a few days after its period of time, namely, October 26th, 1954, do you recall Mr. Phipps advising you that another broker was quoting your apple concentrate at a price of \$1.25 when your price to him was \$1.30. Do you recall him bringing that up to you on the telephone.

A. I can't remember.

Q. Is it not true that you told Mr. Phipps over the telephone that if there was any difference in prices being quoted to Smucker, it was because the other broker was using his brokerage fees to lower the buyer's price?

Mr. Orlinsky: I object, because there is nothing on the record as to any testimony of any witness called on behalf of the Federal Trade Commission, or correspondence that there was any such conversation on the part of Mr. Koldinsky.

Mr. Koldinsky: A. Definitely no, because I make the brokerage and not the broker.

Mr. Lewis: Isn't it true that while you make the brokerage, the broker will have to agree to any cut in his brokerage?

Mr. Koldinsky: A. Yes.

Mr. Ragsdale:

Q. At the time Mr. Phipps submitted the offer to Smucker of \$1.25 per gallon did you not answer that telegram by a telephone call that you advised Mr. Phipps

that you could not sell that quantity of apple concentrate for less than \$1.30 per gallon.

A. Yes.

Q. Is it not true that on or about that same time Mr. Broch called you up from Chicago and advised you that he likewise had an offer from Smucker if you would sell Smucker apple concentrate at \$1.25 per gallon?

A. Yes.

Q. Was there not some considerable argument over the phone as to how much brokerage Broch was to get on this deal?

A. No.

[fol. 144] Q. Is it not true, Mr. Koldinsky, that when you made your original brokerage arrangement with Henry Broch that you agreed to fix his rate of brokerage at 4%?

A. I can't recall. All I know is that in my correspondence I promised him 5%.

Q. Is it not true that when Mr. Broch first called you about the Smucker deal that you maintained that Canada Foods could not afford to come down to \$1.25.

A. If someone asks me a cheaper price, I first tell them no. After they tell me why, and he tells me we could make a deal because of French competition, I told him I would make a new calculation and call him back.

Q. Is it not true Mr. Koldinsky that when you called him back you told Henry Broch that if the brokers would take only 3% of the brokerage on the transaction instead of 5% Canada Foods would also make a price concession which would result in each absorbing one half of the 5¢ differential?

A. The procedure is as follows: normally I call back the broker and tell him the price, the selling condition and his brokerage, and under this condition it can be sold or no business. I remember in this case I told Mr. Broch I can give only 3% commission.

Mr. Lewis: In other words you told him that you could make the deal if he would cut his commission to 3%, but nothing was said as to what part of the differential of 5¢ would be absorbed by you and what part by him.

A. Yes, that is correct.

Mr. Ragsdale:

Q. Mr. Koldinsky, is it not true that on each and every other order Broch sold for Canada Foods he received a brokerage of 5%?

A. Yes.

Q. Do I understand that you had another transaction with Mr. Broch for apple concentrate later in the year 1955?

A. Yes, for the sale of apple concentrate.

Q. What commission did he get?

A. 5% and selling price \$1.30 in 1954-1955.

Q. During the season which began in or about October 1954 until approximately July 1955 you had another transaction [fol. 145] in which Mr. Broch represented you as your broker in apple concentrate?

A. Yes.

Q. What was his rate of commission?

A. 5% regardless; and \$1.30 per gallon.

Q. What was the quantity involved in the other transaction?

A. 5 to 150 drums.

Q. An order of 150 drums would be a maximum transaction to any one purchaser?

A. Yes.

Q. Did Mr. Broch represent you as broker in the season beginning in or about the season of October 1955, through the Spring of 1956?

A. Yes.

Q. What rate of commission did he get during this season?

Mr. Orlinsky: I would object to any testimony for the prices and commission for the 1955 to 1956 season.

Mr. Lewis: What was the brokerage commission you paid him through the 1955-1956 season? What was the commission, was it the same commission?

Mr. Koldinsky:

A. I believe Smucker in 1955-1956 took more than the 150 drums at a special price and Mr. Broch's commission was 3%.

Q. In all other transactions Mr. Broch received 5%?

A. Yes.

Q. What was the quantity involved in those other transactions?

A. Highest 100-150 barrels, no one bigger than Smucker.

Mr. Ragsdale:

Q. Is it not true on the orders sold by Tenser & Phipps during 1954-1955 they each received their regular rate of brokerage which was 4%?

A. Yes.

Q. Is that not likewise for your broker in New York, Cuylar & Poole?

Mr. Lewis:

Q. I am not sure whether you previously mentioned this in your testimony in answer to my earlier question, but do [fol. 146] I understand that the price at which you sold to Smucker during 1955-1956 was a special price?

A. Yes, I remember I called myself, and we made a special price with special conditions. This was in order to compete with the European competition.

Mr. Ragsdale:

Q. Mr. Koldinsky is your broker in New York/Cuylar? Was he active in selling your products?

A. Very little activity.

Q. Was Poole active in your Boston territory?

A. Yes.

Q. Is it not true that both of these men in submitting orders to Canada Foods regardless of the quantity involved received a regular brokerage of 4%?

A. Yes.

Mr. Lewis:

Q. What were the quantities involved through sales through Poole?

A. 50 barrels to any one customer.

Mr. Ragsdale:

Q. What quantity is necessary for a buyer to receive a special price?

A. At least 500 barrels, that is the minimum. A small order might be 300 barrels in October, but that could be a large order in June when I am trying to get rid of the balance of my stock.

Q. Mr. Koldinsky, what explanation did you give Mr. Phipps as to why Henry Broch and Company could quote a price on your apple concentrate of \$1.25 per gallon when your price announced to Tenser & Phipps was \$1.30 per gallon?

A. I gave no explanation, because as a matter of principle I do not explain to one broker what I do with another broker.

Q. Mr. Phipps did ask you and insisted on knowing why you were giving Henry Broch and Company a lower price than you were giving Tenser & Phipps, did he not?

A. Mostly if I don't have to answer I don't answer.

Q. Is it not true that in this conversation with Mr. Phipps he made a complaint that another broker of your Company was permitted to quote a lower price than Tenser & Phipps were?

A. I don't remember.

[fol. 147] Mr. Lewis:

Q. Do you recall at any time in talking to Mr. Phipps when he told you he can't sell it to Smucker at \$1.30 and he could only sell at \$1.25 did you ever tell Mr. Phipps that you couldn't lower your price unless there was a cut in brokerage?

A. No, because from the beginning I know I could have had the order from Smucker through Broch, although it is not his territory.

Mr. Ragsdale:

Q. Mr. Koldinsky, do you have any record in writing stating that the Tenser & Phipps territory only covered the State of Pennsylvania?

A. I don't believe I have writing, but I remember I have to be very careful in the territory as I promised him Pennsylvania.

Q. Do you have any recollection whatever of telling Mr. Phipps or any other representative of Tenser & Phipps

that their territory only consisted of the State of Pennsylvania?

A. I would have to look on my records. I remember only that Pennsylvania were Tenser & Phipps, western part of the country, Broch, and eastern part of the country Cuylar.

Q. You have no independent recollection that Tenser & Phipps had only the territory covered by the State of Pennsylvania?

A. No.

Q. Will you look in your records of Tenser & Phipps and see if you can find that the territory was confined to the State of Pennsylvania?

A. I find in my letter of October 25th no mention of territories, but I remember he has Pennsylvania for sure.

Q. Mr. Broch is in Chicago and he has the whole United States?

A. Yes, because he is our best broker and I have no finance trouble with his clients.

Q. Do you recall sending any list to any of your brokers or any of your customers during 1955-1956 quoting a quantity price on apple concentrate?

A. No.

Q. To your knowledge, did Canada Foods Limited at any time since you have been connected with them quote a quantity price to customers in the United States?

A. No.

[fol. 148] Mr. Orlinsky:

Q. Why did you say that you never quoted any quantity price?

A. Because I know there is only one man who can use 500 barrels of concentrate and that is J. M. Smucker, who previously ordered from Europe.

Mr. Ragsdale: I object on the grounds of hearsay and not best evidence.

Mr. Orlinsky:

Q. Mr. Koldinsky, when Mr. Broch called you with reference to the Smucker order and stated to you that Smucker would pay \$1.25 because of competition and he mentioned French competitors, did he mention any other competition?

A. I believe he mentioned only French competitors.

Q. This concentrate in question that has a test of 36 beaume and that is the test for sugar content?

A. No test for soluble solids. 38 beaume would be a high test 10¢ for the \$1.00.

Q. In 1954 were Canadian producers offering apple concentrate of 38 beaume for \$1.30?

A. Yes.

Mr. Ragsdale: I object on grounds of hearsay.

Mr. Koldinsky: My competitor in Kentville sold the concentrate of 38 beaume for the same price as we sold 36 beaume.

Mr. Ragsdale:

Q. Mr. Koldinsky is the quality of Canada Foods concentrate good, bad or indifferent.

A. We have the best concentrate ever made, because we make concentrate in a special equipment delivered from Switzerland which enables us to make the concentrate in 12 to 15 seconds. There is no other equipment in the United States to make it this fast at this low temperature.

Q. Is Canada Foods concentrate better than the French?

A. I would say, yes.

Mr. Lewis:

Q. As I understand it Mr. Koldinsky you went to Chicago sometime in September or October 1954 and saw Mr. Broch for the first time.

A. No the second time, the first time I saw him was in September.

[fol. 148a] Q. Did you on the first occasion agree as to what his brokerage would be?

A. Yes.

Q. You wrote after you got back to Kentville?

A. Yes.

Q. When you met him in Chicago you reached an agreement on the first visit?

A. Yes.

Q. What was the agreement you made with him as to what his commission would be if he represented you as a broker?

A. 5%.

Q. You also visited several other brokers in other parts of the country and you agreed with them to pay them a brokerage of 4%.

A. Yes.

Q. Was there any discussion between you and Mr. Broch or between you and the other brokers with reference to the quantity they would sell for you?

A. I didn't think anyone in the United States could use 250 barrels.

Q. In other words in making your agreement with Mr. Broch and with these other brokers you were proceeding on the assumption they would not sell more than 250 barrels to any one particular customer in one season?

A. Yes.

Q. There was no discussion with Mr. Broch or any other broker that there would be any difference in the commission because of any large quantity being involved?

A. I never discuss it because it is all subject to confirmation.

Q. That is something you had in your own mind because you were protected with confirmation, and you didn't tell Mr. Broch or any other broker that there might be a difference in brokerage rates if a larger quantity was involved?

A. I never discuss quantity.

[fol. 148b] I hereby certify that I, Elsie F. Atkins of Kentville in the County of Kings and Province of Nova Scotia, Stenographer that the foregoing pages one to twenty one are a true transcript of the depositions of Ladislav Koldinsky taken at Kentville, Nova Scotia on the 6th day of August, A. D., 1956 before Mr. A. Webster Macdonald, a Notary Public and that I have faithfully compared the depositions herein transcribed with my shorthand notes and that the transcript is a true copy thereof.

Dated at Kentville, Nova Scotia, this 28th day of September, A.D., 1956.

/s/ Elsie F. Atkins, Stenographer.

DOMINION OF CANADA

Province of Nova Scotia,
County of Kings, to wit:

I, A. Webster Macdonald, a Notary Public in and for the Province of Nova Scotia by Royal authority duly appointed, commissioned and sworn, and residing and practicing at Kentville in the said Province

Do Hereby Certify:

(1) That the paper writing hereto annexed being pages one to twenty one inclusive and identified by my notarial seal is a true transcript of the depositions taken before me at Kentville, Nova Scotia on the 6th day of August, A.D., 1956 pursuant to an order granting motion to take the depositions of Ladislav Koldinsky in the matter of Henry Broch and Oscar Adler, copartners trading as Henry Broch & Co., Docket No. 6484, United States of America Federal Trade Commission granted by John Lewis, Hearing Examiner and dated July 9th, A.D., 1956.

Whereof I have hereunto subscribed my name and affixed my official seal notarial at Kentville, Nova Scotia, this 28th day of September, A.D., 1956.

/s/ A. Webster Macdonald, a Notary Public in and
for the Province of Nova Scotia.

My Commission expires at Her Majesty's Pleasure.

Bulletin #1235
October 13, 1954

HENRY BROCH & CO.

1525 E. 53rd Street

CHICAGO 15, ILL.

APPLE CONCENTRATE—NEW 1954 PACK

Canadian (Nova Scotia) 36 Baume

Top Grade Quality

50 Gal. Wooden Barrels.....	@ \$1.25 per Gal.
55 Gal. Steel Drums.....	@ \$1.30 " "
6 Gal. Cans.....	@ \$1.32 " "

F.O.B. New York

PLACE YOUR ORDERS NOW!

Offering Subject To Confirmation

Henry Broch & Co.

BROKERS AND SALES AGENTS**CABLE ADDRESS HENBROCO****SALES CONTRACT**

FROZEN FRUITS
 FROZEN VEGETABLES
 FROZEN JUICES
 SEAFOODS
 CANNED GOODS
 CANNED MEATS
 PECTIN
 IMPORTED COCOA POWDERS

PHONES: BUTTERFIELD 8-1940

HYDE PARK NATIONAL BANK BUILDING
 1525 EAST FIFTY THIRD STREET
 CHICAGO 15, ILLINOIS

Sold for Account

DATE

Sold To

ORDER NO.

Ship To

BUYERS ORDER NO.

Ship When

Ship Via

Prices F.O.B.

TERMS:

Sold Through

Quantity

Article

Price

Please be sure to send us copies of invoices

FEDERAL TRADE COMMISSION
 DOCKET NO. 6484
 IN THE MATTER OF *Henry Broch & Co.*
 DATE: *10/2/66* WITNESS: *[Signature]*
 ACE REPORTING CO. Official Reporter
 By: *[Signature]*

If incorrect return at once. Otherwise this constitutes a firm sale.

"PLEASE BE SURE TO MARK OUR ORDER
 NUMBER ON YOUR INVOICES."

Seller Guarantees Goods to Conform to the National Pure Food Laws. All Disputes Arising Under This Contract Shall be Arbitrated in Usual Manner. This SALES MEMO constitutes an EXECUTORY CONTRACT between the SELLER and BUYER indicated above and made through ourselves as BROKERS in the transaction. We should be advised at once if incomplete or incorrect in any respect and any alterations or cancellations should be had or confirmed in writing by the BUYER or the SELLER addressed to this office and subject to the legal rights of the other party in the matter. If a more formal contract shall be executed this SALES MEMO shall be subordinate to it. Subject to confirmation of seller.

On all sales made F.O.B. shipping point, both the seller and ourselves act only as the agents of the buyer in arranging for transportation or for any storage in transit or at destination. The buyer assumes all risk of either loss or damage pertaining to the above and herewith releases and holds harmless both the seller and ourselves for all claims in connection therewith. Acceptance of our services is a concurrent acceptance of this condition.

ACCEPTED.....

Buyer

HENRY BROCH & CO.

Please be sure to send us copies of invoices

[fol. 151]

F.T.C.—RESPONDENT EXHIBIT No. 4

CABLE ADDRESS
"BERELSON"

TELEPHONE
YUKON 2-4400

D. B. BERELSON & CO.

244 CALIFORNIA ST. • SAN FRANCISCO

JUL 27 1955

To: HENRY BROCH & CO., CHICAGO, ILLINOIS DATE JULY 7, 1955

SUBJECT COMMISSION PAYABLE

Acct: John Inglis Frozen Foods Co.

Inv.	7150	Atlantic & Pacific Tea Co.	✓	• 14%	\$111.75
	7211	Booth Frozen Foods Corp.	✓	• 3%	<u>13.77</u>
					\$215.52

*Balance of 2 + pr. 67
for 13 months before*

FEDERAL TRADE COMMISSION
DOCKET NO. 6-14-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-36-37-38-39-40-41-42-43-44-45-46-47-48-49-50-51-52-53-54-55-56-57-58-59-60-61-62-63-64-65-66-67-68-69-70-71-72-73-74-75-76-77-78-79-80-81-82-83-84-85-86-87-88-89-90-91-92-93-94-95-96-97-98-99-100-101-102-103-104-105-106-107-108-109-110-111-112-113-114-115-116-117-118-119-120-121-122-123-124-125-126-127-128-129-130-131-132-133-134-135-136-137-138-139-140-141-142-143-144-145-146-147-148-149-150-151-152-153-154-155-156-157-158-159-160-161-162-163-164-165-166-167-168-169-170-171-172-173-174-175-176-177-178-179-180-181-182-183-184-185-186-187-188-189-190-191-192-193-194-195-196-197-198-199-200-201-202-203-204-205-206-207-208-209-210-211-212-213-214-215-216-217-218-219-220-221-222-223-224-225-226-227-228-229-230-231-232-233-234-235-236-237-238-239-240-241-242-243-244-245-246-247-248-249-250-251-252-253-254-255-256-257-258-259-260-261-262-263-264-265-266-267-268-269-270-271-272-273-274-275-276-277-278-279-280-281-282-283-284-285-286-287-288-289-290-291-292-293-294-295-296-297-298-299-300-301-302-303-304-305-306-307-308-309-310-311-312-313-314-315-316-317-318-319-320-321-322-323-324-325-326-327-328-329-330-331-332-333-334-335-336-337-338-339-340-341-342-343-344-345-346-347-348-349-350-351-352-353-354-355-356-357-358-359-360-361-362-363-364-365-366-367-368-369-370-371-372-373-374-375-376-377-378-379-380-381-382-383-384-385-386-387-388-389-390-391-392-393-394-395-396-397-398-399-400-401-402-403-404-405-406-407-408-409-410-411-412-413-414-415-416-417-418-419-420-421-422-423-424-425-426-427-428-429-430-431-432-433-434-435-436-437-438-439-440-441-442-443-444-445-446-447-448-449-450-451-452-453-454-455-456-457-458-459-460-461-462-463-464-465-466-467-468-469-470-471-472-473-474-475-476-477-478-479-480-481-482-483-484-485-486-487-488-489-490-491-492-493-494-495-496-497-498-499-500-501-502-503-504-505-506-507-508-509-510-511-512-513-514-515-516-517-518-519-520-521-522-523-524-525-526-527-528-529-530-531-532-533-534-535-536-537-538-539-540-541-542-543-544-545-546-547-548-549-550-551-552-553-554-555-556-557-558-559-560-561-562-563-564-565-566-567-568-569-570-571-572-573-574-575-576-577-578-579-580-581-582-583-584-585-586-587-588-589-590-591-592-593-594-595-596-597-598-599-600-601-602-603-604-605-606-607-608-609-610-611-612-613-614-615-616-617-618-619-620-621-622-623-624-625-626-627-628-629-630-631-632-633-634-635-636-637-638-639-640-641-642-643-644-645-646-647-648-649-650-651-652-653-654-655-656-657-658-659-660-661-662-663-664-665-666-667-668-669-670-671-672-673-674-675-676-677-678-679-680-681-682-683-684-685-686-687-688-689-690-691-692-693-694-695-696-697-698-699-700-701-702-703-704-705-706-707-708-709-710-711-712-713-714-715-716-717-718-719-720-721-722-723-724-725-726-727-728-729-730-731-732-733-734-735-736-737-738-739-740-741-742-743-744-745-746-747-748-749-750-751-752-753-754-755-756-757-758-759-760-761-762-763-764-765-766-767-768-769-770-771-772-773-774-775-776-777-778-779-780-781-782-783-784-785-786-787-788-789-790-791-792-793-794-795-796-797-798-799-800-801-802-803-804-805-806-807-808-809-810-811-812-813-814-815-816-817-818-819-820-821-822-823-824-825-826-827-828-829-830-831-832-833-834-835-836-837-838-839-840-841-842-843-844-845-846-847-848-849-850-851-852-853-854-855-856-857-858-859-860-861-862-863-864-865-866-867-868-869-870-871-872-873-874-875-876-877-878-879-880-881-882-883-884-885-886-887-888-889-890-891-892-893-894-895-896-897-898-899-900-901-902-903-904-905-906-907-908-909-910-911-912-913-914-915-916-917-918-919-920-921-922-923-924-925-926-927-928-929-930-931-932-933-934-935-936-937-938-939-940-941-942-943-944-945-946-947-948-949-950-951-952-953-954-955-956-957-958-959-960-961-962-963-964-965-966-967-968-969-970-971-972-973-974-975-976-977-978-979-980-981-982-983-984-985-986-987-988-989-990-991-992-993-994-995-996-997-998-999-1000-1001-1002-1003-1004-1005-1006-1007-1008-1009-1010-1011-1012-1013-1014-1015-1016-1017-1018-1019-1020-1021-1022-1023-1024-1025-1026-1027-1028-1029-1030-1031-1032-1033-1034-1035-1036-1037-1038-1039-1040-1041-1042-1043-1044-1045-1046-1047-1048-1049-1050-1051-1052-1053-1054-1055-1056-1057-1058-1059-1060-1061-1062-1063-1064-1065-1066-1067-1068-1069-1070-1071-1072-1073-1074-1075-1076-1077-1078-1079-1080-1081-1082-1083-1084-1085-1086-1087-1088-1089-1090-1091-1092-1093-1094-1095-1096-1097-1098-1099-1100-1101-1102-1103-1104-1105-1106-1107-1108-1109-1110-1111-1112-1113-1114-1115-1116-1117-1118-1119-1120-1121-1122-1123-1124-1125-1126-1127-1128-1129-1130-1131-1132-1133-1134-1135-1136-1137-1138-1139-1140-1141-1142-1143-1144-1145-1146-1147-1148-1149-1150-1151-1152-1153-1154-1155-1156-1157-1158-1159-1160-1161-1162-1163-1164-1165-1166-1167-1168-1169-1170-1171-1172-1173-1174-1175-1176-1177-1178-1179-1180-1181-1182-1183-1184-1185-1186-1187-1188-1189-1190-1191-1192-1193-1194-1195-1196-1197-1198-1199-1200-1201-1202-1203-1204-1205-1206-1207-1208-1209-1210-1211-1212-1213-1214-1215-1216-1217-1218-1219-1220-1221-1222-1223-1224-122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5-2226-2227-2228-2229-2230-2231-2232-2233-2234-2235-2236-2237-2238-2239-2240-2241-2242-2243-2244-2245-2246-2247-2248-2249-2250-2251-2252-2253-2254-2255-2256-2257-2258-2259-2260-2261-2262-2263-2264-2265-2266-2267-2268-2269-2270-2271-2272-2273-2274-2275-2276-2277-2278-2279-2280-2281-2282-2283-2284-2285-2286-2287-2288-2289-2290-2291-2292-2293-2294-2295-2296-2297-2298-2299-2300-2301-2302-2303-2304-2305-2306-2307-2308-2309-2310-2311-2312-2313-2314-2315-2316-2317-2318-2319-2320-2321-2322-2323-2324-2325-2326-2327-2328-2329-2330-2331-2332-2333-2334-2335-2336-2337-2338-2339-2340-2341-2342-2343-2344-2345-2346-2347-2348-2349-2350-2351-2352-2353-2354-2355-2356-2357-2358-2359-2360-2361-2362-2363-2364-2365-2366-2367-2368-2369-2370-2371-2372-2373-2374-2375-2376-2377-2378-2379-2380-2381-2382-2383-2384-2385-2386-2387-2388-2389-2390-2391-2392-2393-2394-2395-2396-2397-2398-2399-2400-2401-2402-2403-2404-2405-2406-2407-2408-2409-2410-2411-2412-2413-2414-2415-2416-2417-2418-2419-2420-2421-2422-2423-2424-2425-2426-2427-2428-2429-2430-2431-2432-2433-2434-2435-2436-2437-2438-2439-2440-2441-2442-2443-2444-2445-2446-2447-2448-2449-2450-2451-2452-2453-2454-2455-2456-2457-2458-2459-2460-2461-2462-2463-2464-2465-2466-2467-2468-2469-2470-2471-2472-2473-2474-2475-2476-2477-2478-2479-2480-2481-2482-2483-2484-2485-2486-2487-2488-2489-2490-2491-2492-2493-2494-2495-2496-2497-2498-2499-2500-2501-2502-2503-2504-2505-2506-2507-2508-2509-2510-2511-2512-2513-2514-2515-2516-2517-2518-2519-2520-2521-2522-2523-2524-2525-2526-2527-2528-2529-2530-2531-2532-2533-2534-2535-2536-2537-2538-2539-2540-2541-2542-2543-2544-2545-2546-2547-2548-2549-2550-2551-2552-2553-25

CABLE ADDRESS
"BERELSON"TELEPHONE
YUEN 3-4000

MAR 3 1956

D. B. BERELSON & CO.

344 CALIFORNIA ST. • SAN FRANCISCO

To: HENRY BROCH & CO., CHICAGO, ILLINOIS

DATE FEBRUARY 27, 1956

SUBJECT COMMISSION PAYABLE

Acct. Ore-Ida Potato Products, Inc.

Inv.					
10167	A & P Tea Co.	✓ 27343	✓	214.50	✓
11950	Mint Fry Potato Co.	✓ 28401	✓	6,420.00	✓
15364	Elsed, Inc.	✓ 28624	✓	131.25	✓
15365	Ryser Bros., Inc.	✓ 28595	✓	131.25	✓
15476	Ryser Bros., Inc.	✓ 28600-18	✓	292.50	✓
15524	Ryser Bros., Inc.	✓ 28640	✓	131.25	✓
15970	E. A. Aaron	✓ 28657	✓	2,325.00	✓
16725	DuPage Produce Co.	✓ 28674	✓	4,200.00	✓
16766	Beatrice Foods Co.	✓ 28645	✓	1,050.00	✓
16859	Beatrice Foods Co.	✓ 28830	✓	150.00	✓
16941	Western Michigan Fr. P.	✓ 28838	✓	840.00	✓
16942	Grant Grocer Co.	✓ 28922	✓	2,100.00	✓
17043	A & P Tea Co.	✓ 28938	✓	225.00	✓
17056	Franklin McVeagh	✓ 28906	✓	150.00	✓
17096	E. J. Byman Co.	✓ 28948	✓	630.00	✓
17111	A & P Tea Co.	✓ 28927	✓	360.00	✓
17134	Edil Kahn Co.	✓ 28976	✓	8,400.00	✓
17194	National Tea Co.			600.00	✓
1244	Consumers Frozen Foods			(80.48)	✓
				\$28,270.27	• 3%
					\$848.11
Inv.	17155 ✓ Jewel Food Stores	28557	✓	8,563.60	• 1 1/2%
					128.45
					\$976.56

open 21798.405

FEDERAL TRADE COMMISSION

DOCKET NO. 6844

RESPONDENT EXHIBIT NO. 5

IN THE MATTER OF *Henry Broch & Co.*DATE *10-3-56* WITNESS

ACE REPORTING CO., Official Reporter

By: *for ace*

BROKERAGE STATEMENT
FLORIDA CITRUS CANNERS COOPERATIVE
LAKE WALES, FLORIDA

FEB 19 1956

MONTH
ENDING

HENRY BROCK
1525 E 53RD ST
CHICAGO ILL

13156

CUST NO	CUSTOMER NAME	INVOICE			GROSS SALES	BROKERAGE TO BE PAID	BROKERAGE ON UNPAID ACCOUNTS
		NUMBER	MO	DATE DAY YR			
430 430	AURORA LOCKER PLAIN	46440		12456	40500		810%
624 624 624	BEATRICE FOODS CO	44964 46903	1	122155 12556	29000 33750	28736 870 3%	675 7%
631 631 631 631 631 631	BEATRICE FOODS	44965 45064 45203 46688 46904 47221	1	122155 122255 122355 12356 12556 13056	3450 6800 7300 2300 2300 3000	23745 104 28732 204 3% 28770 219 3% 28707 46	46 7% 60 4%
987 987	BOWMAN DAIRY CO	45377	1	122955	5800	5787 174 3%	
1317 1317 1317 1317	A J CANFIELD CO.	46403 46907 47316		12456 12556 13056	135000 14500 7250		2700 7% 290 4% 145
1991 1991	CRIGHTON CO	46405		12456	135000	2700 2%	92 580
4286 4286 4286	ILLINOIS FRT & PRO	46915 47229		12556 13056	4600 29000		1350 7%
4765 4765	KING JUICES	46916		12556	67500		

(fol. 154)

RESPONDENT EXHIBIT No. 68

BROKERAGE STATEMENT
FLORIDA CITRUS CANNERS COOPERATIVE
LAKE WALES, FLORIDA

FEB 13 1956

MONTH
ENDING

CUST NO	CUSTOMER NAME	INVOICE			GROSS SALES	BROKERAGE TO BE PAID	BROKERAGE ON UNPAID ACCOUNTS
		NUMBER	MO	DATE DAY YR			
8038 8038	JOHN SEXTON CO	46918		12556	7250		1458
					534300	4317	6893

FEB 11

Bauer & Loewy Trading Corp.

82. BEAVER STREET

New York 5, N. Y. February 8, 1955

Henry Brock + Co
1525 East 53rd Street

Chicago, Illinois

Source
No. 3% 2%

ALL BILLS ARE DUE AND PAYABLE WEEKLY

[illegible]

New York 5. N. Y. March 4, 1955

2%

ALL BILLS ARE DUE AND PAYABLE WEEKLY

APR 11 1938

DATE 12-3-56 WITNESS [Signature] ACE REPORTING CO. Official Reporter

FACE REPORTING CO. Official Reporter

By W. J. [Signature]

Dlgbv 4-9894
4-9895

STATEMENT

APR 26 1955

Bauer & Loewy Trading Corp.

82 BEAVER STREET

New York 5, N. Y. Cupriz S 1955

Henry Baer & Co.
1331 East 43rd Street
Chicago, Ill

Debit 3 1/2% 2 1/2%
 ALL BILLS ARE DUE AND PAYABLE WEEKLY

June 17	Bauer-Stewart	12315	25575		6666 71
June 17	Hamm-Son	12309	25042	2	3467 30
June 17	Bauer-Stewart	12332	25515		2845 71
July 1	Seyal Bros	12366	276	1	26707
July 16	Kitching Co	12359	2482		4700 00
July 16	Harker Bros	12347	802	10	26333
July 16	Harker Bros	12396	802	10	
July 17	Kendall Candy	12412	26648		2400 00
July 19	Kitching Co	12419	2482		8244 72
Aug 21	Kitching Co	12448	2482		233 97
Aug 24	Harker Bros	1241	1873		26333
Aug 28	Kitching Co	12441	2482		6440 00
March 1	Kendall Candy	1243	26648		48 00
April 21	Seyal Bros	1243	105 17		26205
April 1	Bauer-Stewart	1245	25575		249 00
May 1	Hamm-Son	1247	25042		241 30
			1745 32		34346 21

[illegible]

Copy 49894
49893

STATEMENT

Bauer & Loewy Trading Corp.

82 BEAVER STREET

New York 5, N. Y.

MAY 3, 1955

Henry Brock + Co.1535 East 53rd StreetChicago, Illinois

Date		2% INV. #	3%	1%
		Charges	Credits	Balance
Feb. 28	Mother Hubbard	12445	616000	21729 ✓
Mar. 17	Hollywood Brands	12488	26502 800000	
28	"	Cr. 1514	26633 ✓	(720)
31	Gerber Prod.	12527	80250	26533 ✓
"	"	12526	107000	26533 ✓
Apr. 14	Hollywood Brands	12565	26641 ✓	881850
15	Figid Foods	82000 12566	27173 ✓	
19	Hillman	1475.00 12573	26892 ✓	
19	Howick + Son	Cr. 1523	(321)	
21	Newly Kids	693000 12591	26777 ✓	
		9225.00	802929	1681130
27	9225.00	-	18450	

19.00 16,811.30

= 16811
59349

3% 24088

FEDERAL TRADE COMMISSION
 DOCKET NO. 6484
 EXHIBIT NO. 7-3
 IN THE MATTER OF *Wm. B. Davis Co.*
 DATE 10-3-56
 WITNESS
 ACE REPORTING CO. Official Reporter
 By *[Signature]*

[fol. 160] BEFORE THE FEDERAL TRADE COMMISSION

Respondents' Proposed Findings of Fact, Conclusions of Law, and Order—Received F. T. C. November 16, 1956.

Respondents request the following findings of fact, conclusions of law, and order:

FINDINGS OF FACT

1. That respondents' sales approximate approximately from \$4,000,000 to \$5,000,000 annually, and respondents are not a substantial factor in the sale of frozen foods, frozen fruits, fruit juices and other food products.

1a. That the effect of respondents' transactions upon interstate commerce is infinitesimal.

2. That the percent of commissions or brokerage fees paid to respondents by the seller principals they represent are not usually fixed by written contracts between respondents and their principals.

3. That customarily when respondents start representing a seller, the percent of commissions or brokerage they are to receive for the sale of said seller's products is indicated orally, but it is understood by and between respondents and sellers that said indicated rate of commission or brokerage is subject to change and negotiation and to confirmation on each sale, and they sometimes have to negotiate as to commissions to be paid by a seller principal separately on each sale, so that it cannot be said that there is a fixed percent of commission or brokerage under which respondents operate for a particular seller.

4. That respondents operate under an indicated or average brokerage rate for each of the seller principals they represent, but not under a fixed brokerage which cannot be changed.

5. That the indicated percent of commissions or brokerage for all of the twenty-five or more sellers that respondents represent varies from 2 percent to 5 percent, with the average indicated brokerage for all sellers they represent being about 3 percent.

6. That the list, which respondents furnished to Mr. [fol. 161], Eugene Carmichael of the Federal Trade Commission, of the various percents of brokerages paid by the various sellers, represented by respondents, was not in-

tended by them to be a list of fixed commissions, but of indicated commissions which were subject to change.

7. That from time to time respondents accepted and received less than the indicated percent of brokerage because the seller principals would not pay the indicated brokerage, usually because of changing market conditions, but sometimes because they would arbitrarily no longer pay the indicated brokerage, and if respondents would not accept less than the indicated brokerage they would get nothing.

8. That respondents do not earn any commission or brokerage fees on any sale negotiated by them until said sale is confirmed or accepted by their seller principal as to quantity, price, date of delivery, rate of commission to be paid and all other terms of sale, and is delivered to and paid for by the purchaser.

9. That at the time the seller principal, involved in the instant case, had first agreed to authorize respondents to act as its sales broker, it had agreed to pay respondents a brokerage fee of five percent of sales, but said principal also indicated at said time that the rate of brokerage on all sales was subject to change and confirmation as were all other terms of sale.

10. That at the time the seller principal, involved in the instant case, had first agreed to authorize respondents to act as its sales broker, it was not then contemplated by either said seller principal, or by respondents, that respondents would be able to negotiate a sale of the size or quantity of the sale involved in the instant case.

11. That the order involved in the instant case was an unusually large one as compared with other orders of the same product from this seller sold in the United States by respondents or any other broker, and there were definite savings to the seller in the handling and processing of such a large order.

12. That the seller principal involved in the instant case was represented in the United States by other brokers besides respondents, that the indicated percent of brokerage for all its brokers in the United States varied from 3 to 5 [fol. 162] percent, and that respondents were the only brokers in the United States who ever received a brokerage of 5 percent.

13. That respondents, in making the sale, involved in the

instant case, to the J. M. Smucker Company, did not earn any commission or brokerage fee until said sale was confirmed by their seller principal as to price and all other terms, including the brokerage to be paid respondents, and until the sale was paid for by the purchasers.

14. That respondents, in making the sale, involved in the instant case, to the J. M. Smucker Company, did not ever earn, or become entitled to, any more brokerage or commissions than they actually received from their seller principal on said sale; and they received all the brokerage on said sale that they had earned, had agreed to, or had become entitled to.

15. That before said sale, involved in the instant case, was confirmed or accepted by the said seller principal, respondents had agreed to accept a brokerage fee on said sale of 3 percent, so that it cannot be said that they had ever earned 5 percent on said sale.

16. That respondents did not ever grant or allow any buyer 60 percent, or any other percent, of the brokerage fee or commission paid them by any seller principal for services rendered by them in connection with any sale.

17. That the idea of the \$1.25 a gallon price for the apple concentrate instead of the quoted price of \$1.30 did not originate with respondents but with the J. M. Smucker Co. when the Smucker Co. offered to buy 500 drums if they could get it at a price of \$1.25, it being the contention of the Smucker Co. that they could buy from competitors at that price.

18. That both respondents and Mr. Koldinsky of Canada Foods Limited were aware that the contention of J. M. Smucker that they could buy from competitors at \$1.25 was true and that this competition would have to be met.

19. That on October 26, 1954, a day before respondents wrote up the order of J. M. Smucker Co. for 500 drums at \$1.25 a gallon, Tenser and Phipps, a competitor of theirs, [fol. 163] sent a telegram to Canada Foods conveying an offer of the J. M. Smucker Co. to purchase 500 drums at \$1.25, but respondents had several days prior to the sending of said telegram already informed said seller principal that they had a similar order from J. M. Smucker Co.

20. That Mr. Koldinsky of Canada Foods Limited refused the Tenser and Phipps offer because he had already had the same offer from respondents 3 or 4 days earlier

and he didn't like the idea of two offers coming to him from the same customers through two different brokers; and that he was disturbed that Tenser and Phipps had tried to obtain this order from a customer outside of the State of Pennsylvania, which is the territory that he had assigned to them; and that in turning down this offer, he did not discuss with Tenser and Phipps a cut in brokerage or the question of brokerage at all.

21. That between the time that respondents first contacted the J. M. Smucker Co. for the purpose of getting them to buy apple concentrate of the seller principal involved in this case and the time that the sale in question was actually consummated respondents were not aware that their competitor, Tenser and Phipps, was trying to make the same sale.

22. That respondents had agreed to accept 3 percent on the sale involved in the instant case because:

(a) They were told that they could either take it or leave it, and if they had not agreed to take it, the sale would not be made and they would get no brokerage;

(b) They did not consider 3 percent to be a bad commission for such a large sale, in view of the fact that such a large sale would involve less handling expenses for respondents than several smaller orders adding up to the same quantity; and

(c) The percentage was not less than the average 3 percent which respondents customarily operated on for all of their sellers.

23. In connection with the sale, involved in the instant case, to the J. M. Smucker Company, the respondents conveyed to their seller principal the offer of J. M. Smucker Company to purchase an unusually large quantity for less than the quoted price, but they did not request said seller [fol. 164] principal to lower its quoted price, and they did not ever request said seller principal to lower their commission or to deduct any percentage from their commission.

CONCLUSIONS OF LAW

1. That the essential allegations in the Complaint, issued by the Federal Trade Commission, are not supported by substantial evidence and have therefore not been proven by counsel supporting the Complaint.

2. That the acts and practices of the respondents in connection with the sale in question, as proven by the evidence, do not constitute a violation of the provisions of subsection (c) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936.

3. That subsection (c) of Section 2 of the Clayton Act, as amended, was never intended to, and does not now, apply to a factual situation as is involved in the instant case.

4. If the acts and practices of the respondents in connection with the sale in question, as proven by the evidence, would be considered in violation of subsection (c) of Section 2 of the Clayton Act, then the provision of said subsection of said Act is clearly in violation of the due process clause of the Fifth Amendment to the United States Constitution.

ORDER

That the Complaint issued against Henry Broch and Oscar Adler, co-partners trading as Henry Broch & Co., charged with violation of the provisions of subsection (c) of Section 2 of the Clayton Act, be dismissed.

Respectfully submitted, Harold Orlinsky and Fred Herzog, Attorneys for Respondents.

[fol. 165] BEFORE THE FEDERAL TRADE COMMISSION

INITIAL DECISION—February 26, 1957

Edward S. Ragsdale, counsel supporting the complaint;
Harold Orlinsky and Fred Herzog, of Chicago, Illinois,
for respondents.

Before: John Lewis, Hearing Examiner

STATEMENT OF THE CASE

The Federal Trade Commission issued its complaint against the above-named respondents on January 11, 1956, charging them with having violated Section 2(c) of the Clayton Act, as amended. Copies of said complaint and notice of hearing were duly served upon respondents.

Said complaint charges, in substance, that respondents granted and allowed a percentage of their commission or brokerage fee to a buyer of food products, in connection with such buyer's purchase of such food products in commerce. Respondents appeared by counsel and filed answer to the complaint in which they denied, in substance, having engaged in the illegal conduct charged.

Hearings on the charges were held before the undersigned hearing examiner, theretofore duly designated to hear this proceeding, on various dates between May 8, 1956, and October 3, 1956, at Chicago, Illinois, and Pittsburgh, Pennsylvania. The oral deposition of a witness for respondents was also taken on August 6, 1956, at Kentville, Nova Scotia, before a notary public, the undersigned being present at the taking of said deposition, by agreement of counsel.¹

At the hearings held herein, testimony and other evidence were offered in support of, and in opposition to, the allegations of the complaint, the same being duly recorded and filed in the office of the Commission. All parties were represented by counsel, participated in the hearings, and were afforded full opportunity to be heard and to examine and cross-examine witnesses. At the close of the evidence in support of the complaint, counsel for respondents moved, on the record, to dismiss the complaint herein on the ground that upon the facts and the law the Commission had failed to show the right to relief. The undersigned denied said motion, on the record, without prejudice to its [fol. 166] renewal at the close of the entire case. Said motion was renewed at the close of the case, and is disposed of in accordance with the findings, conclusions and order hereafter made.

¹ It was agreed by counsel that the undersigned could be present during the taking of said deposition, with the right to address appropriate questions to the witness, to observe his demeanor in testifying and to take such observation into account in determining the credibility of the witness. The deposition was made a part of the record as an exhibit on behalf of respondents, in lieu of being read into the record.

At the close of all the evidence, and pursuant to leave granted by the undersigned, proposed findings of fact, conclusions of law and order, together with supporting memoranda, were filed by counsel supporting the complaint, and counsel for respondents on November 15 and November 16, 1956, respectively. No request for formal oral argument was made by any of the parties, except for brief oral argument made on the record by counsel for respondents. Proposed findings which are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as immaterial.

Upon consideration of the entire record herein and from his observation of the witnesses, including the witness whose deposition was taken at Kentville, Nova Scotia, the hearing examiner makes the following:

FINDINGS OF FACT

I. The Business of Respondents

Respondents Henry Broch and Oscar Adler are copartners trading as Henry Broch & Co., with their principal [fol. 167] office and place of business in the Hyde Park National Bank Building, located at 1525 53rd Street, Chicago, Illinois.

Said respondents are now engaged and have engaged, since August 1942, in business as brokers or sales representatives of seller principals, negotiating the sale of frozen foods, frozen fruits, fruit juices, and other food products for and on account of approximately twenty-five or more sellers as principals. Respondents are compensated for making sales of their respective seller principals' food products by being paid a commission or brokerage fee by the respective seller principals. Such commissions or brokerage fees are fixed by agreement with their respective seller principals, and usually range from 2 per cent to 5 per cent of the net purchase price of the food product sold. Said respondents sell such food products to buyers, located in various cities and towns in many of the states of the United States, who are chiefly engaged in business as food manufacturers or distributors of food products. Respondents' sales of such food products are substantial,

amounting to approximately \$4,000,000 to \$5,000,000 annually.²

II. The Interstate Commerce

In the course and conduct of their business said respondents are now, and since August of 1942 have been, engaged in commerce, as "commerce" is defined in the Clayton Act, as amended by the Robinson-Patman Act.* Said respondents, [fol. 168] during the period stated, as brokers or sales representatives for their sellers as principals, have sold food products to buyers located in the various states of the United States and caused said food products so purchased to be transported from the respective sellers' places of business to destinations in other states where such buyers were located. Thus there is, and has been at all times mentioned herein, a continuous course of trade in commerce in said food products across state lines.

III. The Alleged Unlawful Practices

A. The Issues

1. The charges in this proceeding arise out of the sale of 500 steel drums of apple concentrate on October 27, 1954, by respondents, as brokers for Canada Foods Ltd. (herein referred to as Canada Foods) of Kentville, Nova Scotia, Canada, processors of apple concentrate and similar products, to The J. M. Smucker Co. (herein referred to as Smucker) of Orrville, Ohio, manufacturers of apple butter and preserves.

2. The complaint charges that the normal and customary

² Respondents have denied the allegation of the complaint that they are a substantial factor in the sale of food products. The undersigned finds it unnecessary to resolve this question since the allegation made in the complaint is immaterial in this respect. It is sufficient, for purposes of Section 2(c), if the sales involved are of more than de minimis quantities and if respondents have engaged in the conduct charged. There is no requirement, as in the case of Section 2(a), of a showing of probable substantial injury to competition or of tendency to monopoly. *Oliver Bros. v. FTC*, 102 F. 2d 763, 767 (C. A. 4, 1939).

commission or brokerage fee for sales on behalf of Canada Foods was 5 per cent, but that instead of receiving such fee, respondents requested their seller principal to lower its established price of the apple concentrate, and to recoup part of such price reduction out of the brokerage fee which respondents would have earned at their normal brokerage fee of 5 per cent. It is alleged that by giving up part of their commission so as to permit a lowering of the price to the buyer, respondents were granting or allowing a percentage of their commission or brokerage fee, directly or indirectly, to the buyer, thereby violating Section 2(c) of the Clayton Act, as amended.

3. Respondents have admitted, in their answer, certain of the basic facts relied upon by counsel supporting the complaint. They admit that the seller principal, Canada Foods, first agreed to pay them a brokerage fee of 5 per cent, but allege that this fee was based on contemplated sales of much smaller quantities than the sale in question. They admit also, that the seller lowered his price from the original quotation of \$1.30 per gallon to \$1.25 per gallon, [fol. 169] and that they accepted a brokerage fee of 3 per cent instead of 5 per cent. They allege, however, that the reduction in the price was the result of competitive conditions and that the reduction in brokerage resulted from the unilateral action of the principal and not from any suggestion on their part. Respondents assert, in this connection, that there is no such thing as a customary or normal brokerage fee, but that the amounts vary from time to time, even for the same seller and with respect to the same product, depending on quantity and market conditions.

4. The basic question presented is whether the reduction of respondents' commission on the sale in question was part of an arrangement to grant or allow the buyer part of respondents' normal commission, or whether it was accomplished in accordance with a flexible brokerage arrangement between respondents and their principal in which brokerage varied with quantity and market conditions. Respondents have also raised a number of legal questions concerning the application of Section 2(c) to them and its constitutionality as applied to the facts here.

B. Chronology of Events

1. Respondents were first appointed to represent Canada Foods in the spring of 1954, following an exchange of correspondence between them in the latter part of April and early part of May. The rate of commission agreed upon was 5 per cent. There were apparently no extensive sales made prior to October 1954, since Canada Foods only had a few hundred barrels of concentrate on hand, these being the unsold balance of the pack which had been processed in the fall of 1953. In any event, no sales were made to Smucker from this pack.

2. Canada Foods began to process the 1954 pack of apples during the latter part of September. When the season began, it was apparently represented in the United States by only two brokers, respondents and the Poole Company of Boston. However, during the latter part of September it also appointed as broker, Tenser & Phipps of Pittsburgh, Pennsylvania, who had previously represented its predecessor company. During October it appointed Otto W. Cuyler of Webster, New York to also [fol. 170] represent it. The brokers, other than respondents, were appointed with the understanding that their rate of commission would be 4 per cent. Respondents received a higher rate of commission because they stocked merchandise in advance of sales.

3. The record discloses that the first attempt to sell Canada Foods' apple concentrate to Smucker was made, not by respondents, but by A. J. Phipps of Tenser & Phipps, which had been dealing with Smucker for many years on behalf of other sellers. Phipps' efforts to sell the concentrate to Smucker began several weeks prior to respondents' first contact, and are herein referred to because of the light which they shed on the transaction at issue.

4. By letter dated October 1, 1954, Phipps advised Smucker that Canada Foods was processing apple concentrate on a large scale and that they expected to receive the price within the next five or six days. Smucker was also

advised that samples of the new pack were on the way and would be forwarded to Smucker as soon as they arrived.³

5. Canada Foods advised Tenser & Phipps by Western Union night letter, dated October 11, 1954, that the price of the new pack of apple concentrate would be \$1.30 per gallon, in 50 gallon steel drums. This price was confirmed in a letter from Canada Foods, dated October 13, 1954. The same price was also quoted to respondents by Canada Foods in a letter which was likewise dated October 13.

6. On October 14, apparently following an earlier telephone conversation with H. W. Kieffer, purchasing agent for Smucker, Phipps advised Smucker by letter that the price of Nova Scotia apple concentrate would be \$1.30 per gallon, delivered in steel drums. A copy of Canada Foods' [fol. 171] price list was also sent to Smucker, as was a sample of the apple concentrate on October 15.

7. Following the receipt of price information and sample, Smucker's purchasing agent, Kieffer, discussed the matter by telephone with Phipps. From the correspondence which is in evidence, it would appear that this conversation took place sometime between October 15 and 18. Kieffer endeavored to obtain a more favorable price, indicating that he was interested in buying approximately 500 barrels of the concentrate. Phipps informed Kieffer that he would communicate with his principal to see what could be done about getting a better price.

8. Phipps talked to L. Koldinsky, manager of Canada Foods, about Kieffer's proposal by telephone or or about October 18, and discussed the matter further in person when Koldinsky came to Pittsburgh on October 19, 1954, on a business trip.⁴ Koldinsky informed Phipps that \$1.30

³ The advice from Phipps to Smucker was in accordance with a letter from Canada Foods, dated September 29, 1954, advising Phipps that the price for the new season had not yet been settled but would be on hand in about five or six days, and that samples of the concentrate were being forwarded under separate cover.

⁴ Koldinsky corroborated Phipps' testimony that he had visited the latter on a business trip to the United States in the fall of 1954. A letter which Phipps wrote to Smucker on October 20, fixes the date of this meeting as October 19.

was his best price and that if not for the Canadian Government subsidy on apples, he would not even be able to sell at that price.

9. On October 19 Phipps telephoned Kieffer and advised him of his conversation with Koldinsky. This advice was confirmed by letter from Phipps to Smucker, dated October 19, stating that Koldinsky had informed him "there positively will be no lower price on apple concentrate" and that the "only reason for making the price of \$1.30 per gallon is the fact that it is a Government support proposition." Phipps urged Kieffer to place his order. Another letter from Phipps to Kieffer on October 20 advised Kieffer of the visit from Koldinsky and the latter's advice that when Canada Foods finished processing the Government subsidized apples "the price [of \$1.30] will no longer be available.

[fol. 172] 10. In an apparent effort to maintain the status quo while Kieffer made up his mind, Phipps wrote to Canada Foods on October 20, requesting a ten-day option for Smucker on 500 to 700 barrels of concentrate. Koldinsky replied by letter dated October 25 in which, after expressing his pleasure at meeting Phipps during his recent visit, he repeated that the price was still \$1.30 per gallon and concluded:

"Further to your letter of October 20, I am sorry to advise you that I am unable to give you an option for 10 days for Smucker, covering 500 to 700 barrels. As I already informed you, the situation with regards to concentrate does not look to [sic] bright, and prices are liable to rise."

11. On or about October 26, while Phipps was in Orrville at the Smucker plant, Kieffer offered to purchase 500 gallons of concentrate at \$1.25 per gallon. Prior to that time Kieffer had endeavored to obtain a better price than \$1.30, but had not definitely indicated at what price he would be willing to buy. At the October 26 meeting he advised Phipps that he had another offer for apple concentrate at \$1.25 per gallon.⁵ Phipps thereupon wired Canada Foods on October 26 as follows:

⁵ The record does not clearly establish who, if anyone, had made the offer of \$1.25 per gallon. Kieffer's testimony in-

"Smucker Orville offer \$1.25 per gallon for 500 drums 36 Baume concentrate like samples submitted has been offered this price shipment early January"

12. The following day, October 27, Koldinsky telephoned Phipps and advised him that Canada Foods could not sell the concentrate for less than \$1.30 per gallon, again in-[fol. 173] dicating that it was only because of the Government subsidy that they could sell at that price. After some discussion, Koldinsky stated that the only way the price could be less than \$1.30 would be if the brokerage was cut. Phipps gave no indication of a willingness to accept a cut in brokerage, and the conversation was concluded. Phipps then telephoned Kieffer to advise him of his inability to obtain a lower price, and sent him a letter in confirmation of their conversation as follows:

"As per my telephone conversation with you today, Mr. Koldinsky called from Kentville. He merely said that the price was a government price and there was nothing that could be done about it.

"He has a base price, plus freight to Eastern Seaboard, plus brokerage and that is it.

"We could confirm the order at the price of \$1.25, but we are very much afraid that we would be right in the way of the Robinson-Patman Act and we might find our names in print.

"It would be a feather in somebody's cap to decorate us with the violation and further, we do not believe that you are the kind of folks that would want to go along with a deal of this kind knowingly.

"Frankly, we do not know how to handle the situation. We do hate to lose the business, but there is nothing that we can put together that will come up

icates that he had offerings of European concentrate at that price, but that it was of an inferior grade. As will appear, Kieffer had also talked to respondent Henry Broch at or about the same time and it may be that he had received the impression from Broch that he could buy the concentrate at \$1.25 per gallon.

with the right answer and leave us with clean slates, all of which we regret exceedingly.”⁶

⁶ The above findings with respect to the conversation between Phipps and Koldinsky are based on Phipps’ testimony. Phipps impressed the undersigned generally as being worthy of belief, and his testimony in many important respects was corroborated by letters written contemporaneously with the events at issue, while the details were still fresh in his mind. Koldinsky’s version of this conversation was that he refused Phipps’ offer because he had already made a deal with Henry Broch three or four days prior thereto and because Phipps’ territory was limited to the State of Pennsylvania. He also denied suggesting that the only way the price could be reduced would be if Phipps took a lower commission. The undersigned cannot credit Koldinsky’s version of the conversation. He impressed the undersigned as being confused concerning many of the facts about which he testified, having no correspondence or memoranda with him to refresh his recollection, and appeared to be engaging in some ex post facto rationalizing in order to justify his position. There is nothing in the record to substantiate his claim that Tenser & Phipps were restricted to Pennsylvania in their sales. His letter of September 29, designating the latter as broker, contains no such limitation. The correspondence and reliable testimony in the record indicates that Koldinsky was aware Phipps was negotiating with Smucker at least as early as October 19 when Koldinsky was in Pittsburgh, and yet he did not suggest to Phipps that he was acting outside of his assigned territory. His letter of October 25 to Phipps, turning down the Smucker proposal because “prices are liable to rise,” hardly suggests that he had already made a deal to sell through Broch at \$1.25 per gallon. The fact that Kieffer on October 26 made Phipps a definite proposal for 500 drums at \$1.25 indicates that Smucker had not yet closed with Broch. The reference in the October 27 letter from Phipps to Smucker that Phipps could not confirm the order at \$1.25, without running afoul of the Robinson-Patman Act, tends to confirm Phipps’ testimony that he had received some suggestion from Koldinsky with respect to reducing his commission as a condition for a reduction in price.

[fol. 174] 13. Within a day or two prior to October 27, respondent Henry Broch also communicated with Kieffer of the Smucker organization in an effort to sell apple concentrate on behalf of Canada Foods. Kieffer advised Broch that he already had an offer of \$1.30 per gallon on Canada Foods' concentrate, but indicated he might be interested if he could get a better price. Broch asked Kieffer what quantity he had in mind and Kieffer told him it would be about 500 drums. Broch stated he would contact his principal and see what could be done.

[fol. 175] 14. On or about October 26, which was either the same day or the day following that on which he talked to Kieffer, Broch telephoned Koldinsky of Canada Foods and told him he could sell approximately 500 drums of apple concentrate to Smucker if he could get a price of \$1.25 per gallon. Broch indicated that Smucker was able to buy French concentrate in the United States at \$1.25 per gallon. Koldinsky told Broch he would take the proposition under advisement and call him back.⁷

15. The following day, October 27, Koldinsky telephoned Broch and informed him that he would be willing to make

⁷ In an apparent effort to establish that Broch talked to Koldinsky about the Smucker order prior to the time Phipps did, counsel for respondents refer to Koldinsky's testimony as establishing that Broch called him about the Smucker proposal a week or ten days before the order of October 27. However, it seems clear from the record as a whole that not more than about two days, if that much, elapsed between Broch's conversation with Kieffer, his submission of the Smucker proposal to Koldinsky, and the latter's approval. Broch prepared the order on October 27, when he received Koldinsky's approval. According to the latter's testimony he gave Broch his approval either the same day or the day following that on which Broch called him about Smucker. The testimony of both Broch and Kieffer indicates that only a few days elapsed between their telephone conversation and Koldinsky's approval of the deal. Koldinsky's letter of October 25 to Phipps, referring to the possibility of a price rise, suggests that as late as that date he was not thinking in terms of any proposal to reduce the price.

the sale at \$1.25 per gallon, provided that Broch would agree to reduce his commission from 5 per cent to 3 percent. From the entire context of events it may be inferred that call followed Koldinsky's telephone conversation the same day with Phipps, in which the latter declined to accept a cut in brokerage as a condition for a lower price. Broch agreed to Koldinsky's proposal and then telephoned Kieffer to advise him that his principal had agreed to sell at \$1.25 per gallon, due to the large size of the order. A sales contract was then prepared, dated October 27, 1954, for 500 steel drums of apple concentrate at \$1.25 per gallon. [fol. 176] 16. Following the agreement to sell 500 drums to Smucker through Broch, Koldinsky of Canada Foods sent a wire to Phipps requesting the latter to stop selling concentrate for one week. To this, Phipps replied by letter dated October 29 stating, in part, as follows:

"We do not know how to talk to you regarding this Smucker deal on the 500 barrels. We do hope the buyer's position is legal. The Robinson-Patman Act prohibits remittance of brokerage to the buyer and they are always looking for some publicity with larger concerns.

"All we want to know is that your price quoted to other brokers was the same as that given to us.

"We had hoped to do a great big business with you folks, but on the basis of what has happened on this deal, we feel that our hands are more-or-less tied, because it has not been our custom to work with unclean hands"

17. In a telephone conversation between Koldinsky and Phipps soon after the October 29 letter, Koldinsky advised Phipps that his price was still \$1.30 per gallon and that if anyone was selling the concentrate at less than \$1.30, they were giving up part of their brokerage.

18. About two weeks later, Koldinsky advised Phipps that he had a few hundred barrels of concentrate to sell and the latter, by letter dated November 15, requested a price quotation. Koldinsky replied by letter dated November 17, again quoting \$1.30 per gallon as the price of concentrate.

19. On December 8, 1954, respondents made another contract with Smucker on behalf of Canada Foods to sell

and additional 50 steel drums of apple concentrate at \$1.25 per gallon. Shipments on the October 27 and December 8 contracts were made between December 9, 1954, and May 1, 1955, totalling 32,589.44 gallons which, at the invoice price of \$1.25 per gallon, amounted to \$40,736.80. Respondents received a commission of 3 per cent on these sales to Smucker. During the same period respondents made sales [fol. 177] to a number of other buyers of apple concentrate at a price of \$1.30 per gallon, said sales totalling approximately \$50,000. On the latter sales Broch received his regular commission of 5 per cent.

20. Sales were also made during the same period by Canada Foods through its other brokers. The price of the concentrate in all such sales was \$1.30 per gallon and all the other brokers received their agreed commission of 4 per cent.

C. The Agreement as to Commission

1. Although apparently conceding in their answer that there was an agreement between respondents and their seller principal to pay respondents a commission of 5 per cent, respondents take the somewhat contradictory position that there was no such thing as a fixed rate of commission and that they sometimes had to negotiate with their seller principals separately on each sale. Respondents endeavored to establish through the testimony of respondent Henry Broch, that any understanding between Broch and his principals was, at best, of such a vague, uncertain and amorphous nature as to be almost meaningless. Thus, Broch testified that the sellers merely gave him an "indicated" or "appropriate" rate of brokerage, but that this could be changed "any day" as the seller "sees fit." He denied that there were any written agreements between broker and principal, or anything in writing concerning the rate of commission. However, he conceded that "there might be an indication" (without revealing where such indication could be found), but that this was "never anything specific; definitely specified."

When asked on cross-examination whether it was not true that the understanding as to brokerage was usually confirmed by correspondence between the parties, Broch testified that this was "not necessarily" true, that there were "very few letters" specifying brokerage, and that

he was unable to recall having any such letters. When asked whether he meant to suggest that in going out to sell on behalf of some 25 or more sellers, he actually did not know what brokerage he was going to be paid, Broch at first replied: "That is correct." However, the absurdity [fol. 178] of this position apparently occurred to him after further reflection and he later conceded that it "might not be as hazy" as suggested by counsel supporting the complaint, and that he had a "general idea" as to what his commission would be.

Broch's testimony was a masterpiece in circumlocution and evasion, was contrary to the probabilities inherent in the situation, and was contradicted by other reliable evidence in the record. Based on his evaluation of the testimony as a whole and his observation of the demeanor of the witness, the undersigned can give no weight to Broch's claims.

2. Whether or not it can be formally characterized as an agreement, there is no question but that there was a written understanding between Broch and his seller principal, Canada Foods. Such understanding originated in the correspondence which passed between them in the spring of 1954, to which reference has been heretofore made. In the letter of April 21, 1954, Canada Foods advised Broch that it was looking for an agent in the Central United States and, after quoting the selling price of the apple concentrate, stated: "In this price is included 5% commission for you." Respondents accepted the appointment, under the conditions indicated, by their letter of May 5, 1954, in which they stated, in part:

"* * * we are very pleased that you are appointing us as your executive agents for the Mid-Western territories and rest assured that we will do the right kind of job for you."

Although not claiming that the arrangement reflected in the above correspondence had ever been rescinded, Broch testified that his agreement with Canada Foods was entirely oral and was made in the fall of 1954, when Koldinsky visited him in Chicago. It seems quite likely that the arrangement made in the spring of 1954 was still in effect in the fall of that year and that Broch was mistaken in his

testimony. Assuming, however, that the earlier arrangement was withdrawn, it is clear from the testimony of respondents' witness, L. Koldinsky, that any arrangement which he made with Broch in the fall of 1954 was confirmed in writing and provided for a commission of 5 per cent.*

3. Respondents also endeavored to show that whatever arrangement as to commission might have been made initially, such arrangement was of no long range significance since each sale was "subject to confirmation." Both Broch and Koldinsky testified to this effect, and respondents also offered in evidence the sales contract used by them which recites that the sale is: "Subject to confirmation of the seller."

The undersigned is satisfied from the evidence as a whole that the "subject to confirmation" provision has nothing to do with the rate of brokerage, as between seller and broker, and does not contemplate renegotiation of the rate of brokerage on a sale-by-sale basis. To hold otherwise would be to assume that the parties intended to agree to a nullity when they fixed the rate of commission at 5 per cent. As a matter of common sense, a provision that a sale is "subject to confirmation of the seller" merely constitutes notification to the buyer that the seller may refuse to confirm a sale made by his broker if he is not satisfied with the terms thereof, as between himself and the buyer, such as price, quantity, terms of payment and delivery dates. That such was the meaning which was intended here seems evident from the context of the sales contract in which the cited language appears, and also from the testimony of Broch himself.⁹

[fol. 180] It is significant that in none of the correspond-

* Koldinsky testified that it was his normal procedure to confirm brokerage arrangements in writing and that "in my correspondence I promised him [Broch] 5%."

⁹ Although Broch made the characteristically exaggerated claim that the term in question contemplated that there would be confirmation "as to everything," in giving an explanation of the matters to be confirmed he unwittingly testified that it involved confirmation "as to price; when he [the seller] wants to sell or when he wants to ship."

ence in evidence, either the letters from Canada Foods to Broch or to Tenser & Phipps, or any of the other brokers, is there any indication that the rate of commission specified is "subject to confirmation." From the manner in which the parties conducted themselves, it is clear that they understood they were proceeding on the basis of a definitely fixed rate of commission and not one which was subject to re-negotiation from sale to sale.

4. In addition to the somewhat contradictory claims that there was no definite agreement as to commission, and that if there was one, it was subject to re-negotiation, respondents advanced the additional contention that the agreement to pay a commission of 5 per cent was based on contemplated sales of much smaller quantities than the sale in question. The testimony offered in support of this contention followed the same confused, contradictory and unconvincing pattern as some of the other testimony which has been referred to above. Thus, Broch testified that when he and Koldinsky discussed the arrangement in the fall of 1954, it was contemplated that he would sell approximately 1000 drums a year to all his customers, but that there was no discussion concerning the amount which it was contemplated would be sold to any individual account. However, after a little prodding from his counsel, Broch finally testified that it was contemplated the sales to any one customer would not exceed 50 to 100 drums. Koldinsky, on the other hand, testified that Broch advised him that he could sell several thousand barrels of the concentrate but that there was no discussion as to the quantity to be sold to any individual account. While Koldinsky indicated that it had been his impression that no one in the United States could use more than 250 barrels, he definitely stated the matter of quantity was never discussed in fixing Broch's rate of commission.

The undersigned is satisfied from the evidence as a whole that whatever discussion there may have been with respect to the quantity of sales, the rate of commission agreed upon was fixed without reference to the quantity sold, either to all customers or to any individual customer. The record [fol. 181] shows that when Smucker made another purchase in December 1954 for only 50 barrels, he still received the same favorable price which he had been given on the

larger order of 500 barrels, and Broch received the same 3 per cent commission. Conversely, another purchaser who made substantial purchases during the same period paid the \$1.30 price and Broch received his regular 5 per cent commission.¹⁰

The fact that the rate of commission agreed upon with Canada Foods was a fixed percentage, without regard to the quantity involved, is further corroborated by a list of respondents' principals which was given to a Federal Trade Commission investigator by respondents prior to the issuance of the complaint, containing the rate of commission payable by each principal. The rate of commission specified in this document for Canada Foods is 5 per cent. The same document indicates a fixed rate of commission payable by all of the other sellers represented by respondents with the exception of one seller, for whom the document indicates a variation of commission from one per cent to 3 per cent, "according to volume and selling price of products."¹¹

Respondents contend that the rates of commission specified in the list given to the Commission investigator were merely "indicated" rates and offered evidence to show that there were variations from the rates reflected in the document. The evidence offered by respondents involved four out of approximately 25 sellers represented by respondents. Two of the sellers are not directly represented by respondents [fol. 182] but respondents act through a co-broker. The rate of commission with the sellers in those instances was

¹⁰ The record shows that during the period between October 1954 and March 1955, deliveries to Smucker amounted to \$25,904, while deliveries to another buyer represented by respondents, Squire Dingee Company, amounted to \$16,763. On the latter sales the rate of commission was 5 per cent.

¹¹ The Commission investigator testified that the document was prepared under the direction of Henry Broch and given to him. Broch was somewhat evasive and confused in his testimony as to whether his office had prepared the document or whether the investigator had prepared it from records in Broch's office. Broch conceded, however, that the information contained therein was correct.

established by the co-broker and not by respondents, and it is clear that the reasons for any changes or variations in commission as between the co-broker and his principals is a matter which does not lie within respondents' personal knowledge. In any event, the record contains no reasons as to the variations in commission nor is there any indication that such variations were geared to the quantity involved.

The third account cited by respondents is clearly inapposite since it involved a situation where after a particular date the rate of commission was reduced on all sales from 3 per cent to 2 per cent. The record does not indicate the reason for such change nor that it had anything to do with quantity. So far as appears from the record, respondents merely re-negotiated the rate of commission with their seller principal so that on all sales to all customers beginning in January 1956, a new rate of commission was applicable. The fourth instance cited by respondents involves the very account to which reference has been made, as being the only account in the list given to Commission investigator, where there was any indication of a variation in commission according to quantity.

These accounts do not appear to be typical, and hardly establish the existence of a loose, flexible practice as to commission or that the rate of commission customarily varies with quantity. It is possible that some of these transactions may be subject to the same vice as that here involved. In any event, whatever may have been respondents' arrangements with other sellers, the undersigned is satisfied from the record as a whole that in the case of the Canada Foods' account there was a definite arrangement that respondents would be paid a commission of 5 per cent on sales, and that this arrangement was made without regard to the quantity involved in any particular sale.

D. The Legal Questions

Insofar as is here pertinent, subsection (c) makes it unlawful—

"for any person engaged in commerce, in the course [fol. 183] of such commerce, to pay or grant . . . anything of value as a commission, brokerage, or other compensation, or any allowance or discount in

lien thereof, * * * in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

In addition to taking issue with counsel supporting the complaint with respect to the facts surrounding the transaction at issue, counsel for respondents have also raised a number of legal questions. They contend that subsection (c) was not intended to apply to independent brokers such as respondents; that even if it was so intended, respondents' conduct does not fall within the section; and that in any event, the section would be unconstitutional if applied to the factual situation here involved. The examiner now turns to a consideration of these arguments.

1. The application of Section 2(c) to independent brokers

Counsel for respondents contend that Section 2(c) was intended to prevent so-called "dummy" brokerage, i.e., payments of brokerage to the buyer or to a broker or agent acting on behalf of the buyer, or subject to the buyer's control, but that Congress never intended the section to apply to so-called "pure" brokers, i.e., brokers who represent only the seller in a transaction and are not connected in any way with the buyer. Counsel's argument rests, in part, on the reference in the House Judiciary Committee Report to the practice of certain large buyers in demanding the allowance of brokerage, either directly to them or to an agent whom they set up in the guise of a broker.¹²

[fol. 184] Counsel's argument overlooks the fact that the illustration referred to in the committee report is merely cited as being "among the prevalent modes of discrimination at which this bill is directed," and is by no means intended to be exhaustive of the methods by which the section in question may be violated. On the contrary, it is

¹² H. R. Rep. No. 2287, 74th Cong., 2d Sess. 15 (1936)

clear from the legislative history that subsection (c) was included in the bill as part of a broad congressional plan to shore up the avenues of evasion which had arisen under the earlier narrow prohibition on price discrimination in the original Clayton Act, one of the prominent modes of evasion from which was the use of brokerage as an indirect method of price discrimination. As stated in the very report cited by respondents, subsection (c) was intended to prevent "the abuse of the brokerage function for purposes of oppressive discrimination."

In considering the proposed legislation Congress had before it statements such as the following, which was made by a representative of the Associated Grocery Manufacturers of America, one of the proponents of the legislation:¹³

"This association supports a valid, sound, and constructive amendment of section 2, *effective to strengthen its protective application against price discrimination* offensive to the competitive principle; that is, an amendment (a) which broadens the section's prohibitory jurisdiction to the extent permitted and consistent in the circumstances, (b) which tightens its exemptions against their misuse to defeat the law, (c) *which makes the section expressly prohibit indirect price discrimination by brokerage diversion to a trade buyer*, and (d) which makes the section expressly and reasonably regulate distribution-service payments to prevent their degeneration into an indirect price discrimination violative of the section and thus nip [fol. 185] its violation in the bud." [Emphasis supplied.]

Further reflecting the broad purpose of subsection (c) is the statement made by Representative Patman during the legislative debates that the section was—

"directed against the corruption of the true brokerage function as a real and valuable servant of commerce, into a subterfuge for those unfair and coercive price

¹³ Hearings before subcommittee of Committee on Judiciary on S. 4171, 74th Cong. 2d Sess. 62 (1936).

discriminations which constitute such a real menace to commerce.”¹⁴

The undersigned entertains no doubt that subsection (c) was intended not only to reach “dummy” brokerage payments made to a buyer or his representative, but also to prevent a so-called “pure” broker, who represents only the seller in the transaction, from splitting his commission, directly or indirectly, with the buyer in the transaction. That subsection (c) was intended to prevent the splitting of commissions by a seller’s broker has been the commonly accepted understanding of the statute almost from the beginning. Thus, Congressman Patman in his book entitled “The Robinson-Patman Act,” published soon after the passage of the Act, gives the following answer to the specific question whether the Act “prohibits a broker from splitting his brokerage with a buyer” (p. 108):

“Yes. It applies to any person. The intent of Congress, the reports of committees, and the Act are all specific on this point. The payment of *any* brokerage by the seller to the buyer is prohibited. The relationship of the broker to his principal is a fiduciary one. He is, in fact, representing the seller in this instance and would be liable.”

In the book entitled “The Robinson-Patman Act, Its History and Probable Meaning,” published by The Washington Post of Washington, D. C., in October 1936, the following statement appears with respect to the basic structure [fol. 186] true and interrelation of the various subdivisions of Section 2 (p. 6):

“The final enactment contains, in the first instance, a prohibition of price discrimination in sweeping terms. Next, it specifically prohibits a series of practices (*such as split and bogus brokerage*, individualized advertising and service allowances, etc.) which, whether within or without the basic prohibition [of Section 2], are made unlawful because their use may lead to discrimination.” [Emphasis supplied.]

¹⁴ 79 Cong. Rec. 9079 (June 11, 1935).

Addressing itself specifically to the subject of the splitting of commissions, the same work states that subsection (c), (p. 38)—

“prohibits the splitting of brokerage where the seller or the buyer is aware of the practice. For where a broker passes a portion of his commission back to the buyer, it would appear that he is acting, at least in part, ‘for or in behalf’ of such buyer.”

In 1940 The American Institute of Food Distribution, Inc., prepared a booklet for use in the industry entitled “Robinson-Patman Guide Book.” This work expresses the following opinion on the question of whether the Robinson-Patman Act “prevents any splitting of brokerage” (p. 74):

“Seller’s broker cannot legally pass any of his commission to the buyer. This would be the same as the seller making the payment. If the broker does split, the seller would be held liable, particularly if he knew about the practice.”¹⁵

It seems apparent from the foregoing that subsection (c) has been generally accepted as prohibiting the splitting of commission by independent brokers, as well as the granting of “dummy” brokerage to the buyer or someone controlled by or affiliated with a buyer. That this should be so is not surprising in view of the fact that the paying or granting of commission, under the indicated circumstances, is made unlawful for “any person,” and not merely for the seller to the buyer or the latter’s affiliate.

In further support of their argument that Section 2(c) was not intended to apply to “pure” brokers, counsel for respondents claim that the Commission has failed to issue any complaint against brokers not affiliated with a buyer, except in one case, *D. J. Easterlin*, Docket No. 6587, and that the complaint there was dismissed by the Commission before hearing, without any reason for its action being specified (33 F.T.C. 1639). Counsel apparently regard the paucity of decisions on the point and the action taken in

¹⁵ The opinion above quoted purports to be based on instructions issued by the Great Atlantic & Pacific Tea Company to its buyers.

the *Easterlin* case as indicative of the Commission's belief that it lacks jurisdiction over "pure" brokers.

Counsel's argument in this respect is not correct since the Commission has issued complaints in at least two other cases, involving the splitting of commissions by brokers representing sellers only, and has in both instances issued order against the brokers. In *W. E. Robinson & Co., Inc.*, 32 F.T.C. 370, the seller's broker was charged with passing on approximately 50 per cent of his brokerage to certain purchasers and was ordered to cease and desist from such practice. In *Custom House Packing Corp.*, 43 F.T.C. 164, a broker having no connection with the buyers, was found to have violated Section 2(c) by passing on part of his commission to such buyers.

The Court of Appeals for the Fourth Circuit has also made it clear that it upholds the Commission's position that Section 2(c) applies to the seller's broker, in *Oliver Brothers, Inc. v. F.T.C.*, 102 F. 2d 736. Although that case involved a payment of brokerage by a seller to a broker representing the buyer, the court in addressing itself to the argument that the broker was rendering a service to the seller and was therefore entitled to a commission, stated (p. 770):

"And even if it were true that Oliver rendered services to the sellers, we do not think that this would [fol. 188] change the situation. No one would contend that, without violating this section, a broker representing the seller could give his commissions to the buyer; for in such case the action of the broker would be the action of his principal, the seller, and would amount to the allowance of commissions by the seller to the other party to the transaction in direct violation of the statutory provision. As we have seen, it constitutes a clear violation of the section for the buyer to receive commissions allowed an agent who represents him alone. If, therefore, the buyer may not receive commissions allowed either his own agent or the agent of the seller, it would seem to follow necessarily that he may not receive commissions allowed a broker who is the agent of both." [Emphasis supplied.]

It is accordingly concluded that Section 2(c) prohibits an independent broker who represents a seller from splitting

with, or passing on to, the buyer any part of the commission or brokerage to which he is entitled under his agreement with the seller.

2. Application of Section 2(c) to respondents' reduction in commission

Counsel for respondents advance the alternative argument that even if Section 2(c) does apply to the splitting of commission by independent brokers, it is not applicable to the facts here since (a) it does not apply to "indirect" payments or allowances to a buyer and (b) respondents' acceptance of a reduction in commission can, in no event, be considered a payment or allowance of brokerage, either direct or indirect.

a. Counsels' argument that the statute does not apply to indirect payments or allowances to a buyer by a broker is based on the fact that the statute, in declaring it to be illegal for any person "to pay or grant" anything of value as a commission to the other party to the transaction does [fol. 189] not use the words "directly or indirectly" after the phrase "to pay or grant." Counsel point out, in this connection, that when Congress wanted to prohibit payments to brokers or agents under the indirect, as well as the direct, control of the other party to the transaction, it was careful to use the expression "subject to the direct or indirect control" of such party. Counsel apparently regard the omission of a similar phrase, in connection with the prohibition on the payment or granting of brokerage, as significant.

While it is true that Congress, out of an abundance of caution, might have inserted the phrase "directly or indirectly" after the language "to pay or grant," the undersigned does not consider its omission to be of any significance. Considering that it was the basic intent of Congress in adding subsections (c), (d) and (e) to the Act to circumvent indirect forms of price discrimination, and in the light of the expressed intent of Congress in the case of subsection (c) to prevent the "abuse of the brokerage function for purposes of oppressive [price] discrimination," the undersigned cannot believe that Congress intended to give Section 2(c) the narrow scope for which respondents argue. On the contrary, the very portion of the legislative history

cited by respondents contains the statement that Section 2(c) "prohibits the *direct or indirect* payment of brokerage except for such services rendered."¹⁶ It is inconceivable that Congress intended to prohibit the seller's broker from making a direct payment of part of his commission to the buyer, but intended to permit the broker to remit such sum to the seller and have the latter, in turn, transmit it to the buyer. Merely to state the proposition is to demonstrate its absurdity.

b. Counsel for respondents further argue that even if the statute applies to indirect, as well as direct, payments, the conduct of respondents here cannot be deemed to fall within either category. Counsels' argument, in substance, is that since the seller was under no obligation to pay respondents [fol. 190] the 5 per cent commission for any specified period of time, and made it a condition of its approval of the sale that they accept a reduction of commission to 3 per cent; respondents actually "earned" only 3 per cent on the sale, and accordingly they cannot be deemed to have paid, granted or allowed any part of their commission to the buyer.¹⁷ Counsel also argue that it was a *sine qua non*, in establishing respondents' connection with the payment or granting of brokerage to the purchaser, to show that respondents had requested the seller to recoup part of its loss out of their commission.

By arguing that they only "earned" 3 per cent commission and, consequently, did not pass on any of their com-

¹⁶ H. R. Rep. No. 2951, 74th Cong., 2d Sess. (1936).

¹⁷ Counsel for respondents point out in the memorandum filed by them that while the complaint charges, as the violation, the "granting or allowing" of a percentage of their brokerage to the buyer, the Act does not use the word "allowing" in referring to the illegal conduct, but uses the expression "pay or grant." Counsel apparently do not urge this variance between the complaint and the statute as the basis for any serious argument. It may be noted, however, that the word "allow" is defined as "to grant as a deduction or an addition" (Webster's New Collegiate Dictionary, 1949 Edition). Consequently, the charge that respondents granted or allowed a part of their brokerage is clearly synonymous with the language used in the Act.

mission to the buyer, respondents are in effect seeking to lift themselves by their own bootstraps. They seek to escape the application of the statute by the very conduct which makes it operative. As has been found above, it was agreed between respondents and their principal that respondents would receive a commission of 5 per cent on sales made by them. This agreement was in effect on October 27, 1954, and, except for sales to Smucker, is still in effect. By accepting a commission of 3 per cent, under the circumstances here present, respondents were giving up part of what they were entitled to receive, with full knowledge of the fact that their contribution would redound to the benefit of the buyer in the form of a price concession. It may be, as counsel for respondents argue, that there is no proof that respondents actually requested the seller to recoup part of the price reduction out of their commission. However, in the light of the economic realities of the situation, this is immaterial.

Respondents were fully mindful of the fact that the going price of Canada Foods' apple concentrate was \$1.30 per gallon. This was the price at which they sold concentrate to every purchaser except Smucker. This was the price which Tenser & Phipps had already quoted to Smucker, to respondents' knowledge, when the latter intervened in the situation and induced Canada Foods to lower its price. Irrespective of whether respondents actively urged Canada Foods to recoup part of the price reduction out of the commission to which they would otherwise have been entitled, they were fully cognizant of the fact that their acceptance of a reduced rate of commission was a material factor in making possible the sale to Smucker at a reduced price. As the agent for Canada Foods, respondents are equally guilty with their principal of contributing to the price concession which the latter gave to the purchaser. The fact that the principal is beyond the jurisdiction of the Federal Trade Commission, by reason of its situs in Canada, does not absolve the agent from liability for his participation in the transaction.

It may be, as argued by counsel for respondents, that the original agreement between respondents and Canada Foods was not for any specified duration and could have been terminated or modified. However, what is involved here

is not merely a modification of an existing agreement with respect to commission, but a dropping of commission on sales to a single purchaser, combined with a reduction in price to that purchaser under circumstances where it is clear that the reduction in commission was a concomitant of, in fact was the quid pro quo for, the reduction in price. Respondents' acceptance of a lower commission, under such circumstances, is as much a payment of part of their commission to the purchaser as if respondents had directly [fol. 192] paid 2 per cent of their commission to the purchaser.

It may also be, as argued by counsel for respondents, that had they not accepted the 3 per cent they might not have made the sale. However, the choice with which respondents were confronted was largely of their own making since had they not intervened in the situation, it seems quite probable that Tenser & Phipps would have made the sale at the going price, and at their agreed rate of commission. Respondents' conduct, under these circumstances, tends to point up the vice involved in the splitting of commissions as a competitive weapon. In any event, the fact that respondents' conduct was motivated by economic reasons cannot be deemed a legal justification for what they did.¹⁸

c. Counsel for respondents argue, finally, that whatever benefit the buyer may have received when respondents accepted a 3 per cent commission instead of 5 per cent, it did not involve the granting or allowing of commission or brokerage or of any sum in lieu thereof. Counsels' argument appears to be that because a portion of respondents' commission reached the purchaser in the form of a price concession, it cannot be deemed to fall within the proscription of Section 2(c). This argument is wholly without merit.

What the statute prohibits is the payment or allowance to the buyer of "anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof." Under this broad language it is not neces-

¹⁸ *Fashion Originators' Guild v. F.T.C.*, 312 U.S. 457, 468; *Wholesale Dry Goods Institute v. F.T.C.*, 139 F. 2d 230 (C.A. 2, 1943), cert. den. 321 U.S. 770.

sary that the payment be labeled as commission or brokerage. In the instant case the price reduction to the purchaser involved partly an actual price reduction by the seller and partly a portion of the brokerage commission which respondents permitted the seller to retain in order to make possible the full reduction sought by the buyer. Certainly the portion of the price concession to which respondents contributed may be deemed an allowance or [fol. 193] discount in lieu of commission or brokerage, within the meaning of the statute. In fact, if not for such concession on respondents' part, it appears unlikely that there would have been any price reduction to the purchaser.

In both the *Custom House Packing Corporation* case and the *W. E. Robinson & Co.* case, *supra*, the splitting of commission took the form not merely of the transmission of part of the broker's commission to the purchaser, but also was effected indirectly through equivalent price reductions. The latter practice was also considered to be in violation of Section 2(c) and, in the *Robinson* case, the order specifically prohibited a reduction in price which reflected the part of the brokerage payment to which the broker was entitled.

Concluding Finding

Based on the facts hereinabove found, it is concluded and found that respondents, and each of them, have since October 27, 1954, granted and allowed, and are now granting and allowing, directly or indirectly, a portion of the commission or brokerage fee to which they are entitled from their seller principal, Canada Foods Ltd., to the J. M. Smucker Company, a buyer of food products in commerce, in connection with such buyer's purchase of food products in commerce.

3. The question of constitutionality

Counsel for respondents contend that Section 2(c), as applied to the acts and practices here involved, is in violation of the due process clause of the Fifth Amendment because it constitutes an arbitrary discrimination against them. When reduced to its essence, respondents' argument

is that by denying them the right to meet the competition of other brokers who charge a lower rate of commission, Section 2(c) discriminates against them and hence, violates the Fifth Amendment.

Aside from the fact that an administrative agency is required to assume the constitutionality of the laws it administers, the short answer to counsels' contention is that it was laid at rest many years ago in the *Oliver Brothers* case, *supra*. In that case it was contended that Section 2(c) violated the Fifth Amendment because it did not permit [fol. 194] the use of the defensive measures provided with respect to Section 2(a), such as the meeting of competition. In response to this argument the Court of Appeals stated (p. 768):

"And we are not impressed with the argument that when construed without the limitation prescribed by 2(a) section 2(c) is violative of the due process clause of the Fifth Amendment. It is addressed to a definite evil in interstate trade and commerce which Congress has full power to regulate. It is uniform in operation and applies to all persons alike. It is not arbitrary or unreasonable, but is directed toward the elimination of hidden discriminations in price which are thought to be injurious to the proper operation of a free competitive system of trade and commerce and to have a tendency to promote unreasonable restraints and monopolization."

To this it need only be added that Section 2(c) does not require any broker to charge any particular rate of commission. If respondents desire to reduce their rate of commission, they are not denied the right to do so under Section 2(c), except insofar as they use such reduction as a vehicle for granting or allowing something to the buyer to which Congress has stated the buyer is not entitled.

CONCLUSION OF LAW

It is concluded that respondents, and each of them, by engaging in the acts and practices hereinabove found have violated, and are now, violating, the provisions of subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

ORDER

It Is Ordered that respondents Henry Broch and Oscar Adler, copartners trading as Henry Broch & Co., their representatives, agents, or employees, directly or through any corporate or other device, in connection with the sale of food or food products for Canada Foods Ltd., or any other [fol. 195] seller principal, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

(1) Paying, granting or allowing, directly or indirectly, to The J. M. Smucker Company, or to any other buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, any allowance or discount in lieu of broker, age, or any part or percentage thereof, by selling any food or food products to such buyer at prices reflecting a reduction from the prices at which sales of such foods are currently being effected by respondents for Canada Foods Ltd. or any other seller principal, as the case may be, where such reduction in price is accompanied by a reduction in the regular rate of commission, brokerage or other compensation currently being paid to respondents by such seller principal for brokerage service; or

(2) In any other manner, paying, granting or allowing, directly or indirectly, to The J. M. Smucker Company, or to any other buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage or other compensation or any allowance or discount in lieu thereof upon, or in connection with, any sale of food or food products to such buyer for its own account.

/s/ John Lewis, Hearing Examiner.

February 26, 1957.

[fol. 196] BEFORE THE FEDERAL TRADE COMMISSION

NOTICE OF INTENTION TO APPEAL—Filed March 13, 1957

Notice is hereby given that Henry Broch and Oscar Adler, copartners trading as Henry Broch & Co., respondents above named, intend to appeal to the Federal Trade Commission from the Initial Decision of Hearing Examiner John Lewis, entered in this cause on February 26, 1957, and served on said respondents on March 6, 1957.

Dated: March 11, 1957.

/s/ Harold Orlinsky and Fred Herzog, Attorneys
for Respondents.

[fol. 197] BEFORE THE FEDERAL TRADE COMMISSION

FINAL ORDER—Dec. 10, 1957

This matter having been heard by the Commission upon respondents' appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto and the Commission having rendered its decision denying the appeal of respondents and adopting the initial decision as the decision of the Commission:

It is ordered that respondents Henry Broch and Oscar Adler shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist contained in the initial decision.

By the Commission.

/s/ Robert M. Parrish, Secretary.

Issued: December 10, 1957.

BEFORE THE FEDERAL TRADE COMMISSION

OPINION OF THE COMMISSION—December 10, 1957

By Anderson, Commissioner:

Respondents have appealed from the hearing examiner's initial decision which, on the basis of findings of fact therein made, concluded that respondents had violated Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act.¹ The initial decision contains an order to cease and desist which would prohibit respondents from:

[fol. 198] “(1) Paying, granting or allowing, directly or indirectly, to The J. M. Smucker Company, or to any other buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, any allowance or discount in lieu of brokerage, or any part or percentage thereof, by selling any food or food products to such buyer at prices reflecting a reduction from the prices at which sales of such foods are currently being effected by respondents for Canada Foods Ltd. or any other seller principal, as the case may be, where such reduction in price is accompanied by a reduction in the regular rate of commission, brokerage or other compensation currently being paid to respondents by such seller principal for brokerage services; or

“(2) In any other manner, paying, granting or al-

¹ Section 2(c) provides that:

“... it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.”

lowing, directly or indirectly, to The J. M. Smucker Company, or to any other buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage or other compensation or any allowance or discount in lieu thereof upon, or in connection with, any sale of food or food products to such buyer for its own account."

The gravamen of the complaint is that respondents granted and allowed a buyer, the J. M. Smucker Company, referred to in the above-quoted order, a percentage of respondents' commission or brokerage fee in connection with such buyer's purchase of apple concentrate from Canada Foods. The complaint charges that in making such sale, respondents, as brokers, earned their normal and customary commission, or brokerage fee, of five per cent but did [fol. 199] not receive all of such normal brokerage, accepting instead a three per cent commission, and that respondents' seller principal thereupon lowered its established price, recouping part of the reduction out of the brokerage fee which respondents would have earned at their normal brokerage fee of five per cent. It is further alleged that such transaction resulted in the granting or allowing by respondents (brokers) of a percentage of their commission or brokerage fee, directly or indirectly, to a buyer of food products, thus breaching the statute.

The record discloses, respondents admit and the hearing examiner found that the seller principal, Canada Foods, first agreed to pay respondents a brokerage fee of five per cent, but respondents contend that this was based on much smaller quantities than the sale in question of 500 steel drums of apple concentrate. Respondents also admit that their seller-principal originally quoted to the buyer a price of \$1.30 per gallon, which subsequently was reduced and the sale to the buyer consummated at a lower price of \$1.25, with respondents accepting a brokerage fee of three per cent instead of five per cent. It appears to be respondents' further position that the reduced price obtained because of competitive conditions and that the reduction in brokerage resulted from the unilateral action of the principal and not by reason of any request by respondents.

clear from the legislative history that subsection (c) was included in the bill as part of a broad congressional plan to shore up the avenues of evasion which had arisen under the earlier narrow prohibition on price discrimination in the original Clayton Act, one of the prominent modes of evasion from which was the use of brokerage as an indirect method of price discrimination. As stated in the very report cited by respondents, subsection (c) was intended to prevent "the abuse of the brokerage function for purposes of oppressive discrimination."

In considering the proposed legislation Congress had before it statements such as the following, which was made by a representative of the Associated Grocery Manufacturers of America, one of the proponents of the legislation:¹³

"This association supports a valid, sound, and constructive amendment of section 2, *effective to strengthen its protective application against price discrimination* offensive to the competitive principle; that is, an amendment (a) which broadens the section's prohibitory jurisdiction to the extent permitted and consistent in the circumstances, (b) which tightens its exemptions against their misuse to defeat the law, (c) *which makes the section expressly prohibit indirect price discrimination by brokerage diversion to a trade buyer*, and (d) which makes the section expressly and reasonably regulate distribution-service payments to prevent their degeneration into an indirect price discrimination violative of the section and thus nip [fol. 185] its violation in the bud." [Emphasis supplied.]

Further reflecting the broad purpose of subsection (c) is the statement made by Representative Patman during the legislative debates that the section was——

"directed against the corruption of the true brokerage function as a real and valuable servant of commerce, into a subterfuge for those unfair and coercive price

¹³ Hearings before subcommittee of Committee on Judiciary on S. 4171, 74th Cong. 2d Sess. 62 (1936).

discriminations which constitute such a real menace to commerce.”¹⁴

The undersigned entertains no doubt that subsection (c) was intended not only to reach “dummy” brokerage payments made to a buyer or his representative, but also to prevent a so-called “pure” broker, who represents only the seller in the transaction, from splitting his commission, directly or indirectly, with the buyer in the transaction. That subsection (c) was intended to prevent the splitting of commissions by a seller’s broker has been the commonly accepted understanding of the statute almost from the beginning. Thus, Congressman Patman in his book entitled “The Robinson-Patman Act,” published soon after the passage of the Act, gives the following answer to the specific question whether the Act “prohibits a broker from splitting his brokerage with a buyer” (p. 108):

“Yes. It applies to any person. The intent of Congress, the reports of committees, and the Act are all specific on this point. The payment of *any* brokerage by the seller to the buyer is prohibited. The relationship of the broker to his principal is a fiduciary one. He is, in fact, representing the seller in this instance and would be liable.”

In the book entitled “The Robinson-Patman Act, Its History and Probable Meaning,” published by The Washington Post of Washington, D. C., in October 1936, the following statement appears with respect to the basic structure [fol. 186] true and interrelation of the various subdivisions of Section 2 (p. 6):

“The final enactment contains, in the first instance, a prohibition of price discrimination in sweeping terms. Next, it specifically prohibits a series of practices (*such as split and bogus brokerage*, individualized advertising and service allowances, etc.) which, whether within or without the basic prohibition [of Section 2], are made unlawful because their use may lead to discrimination.” [Emphasis supplied.]

¹⁴ 79 Cong. Rec. 9079 (June 11, 1935).

Addressing itself specifically to the subject of the splitting of commissions, the same work states that subsection (e), (p. 38)—

“prohibits the splitting of brokerage where the seller or the buyer is aware of the practice. For where a broker passes a portion of his commission back to the buyer, it would appear that he is acting, at least in part, ‘for or in behalf’ of such buyer.”

In 1940 The American Institute of Food Distribution, Inc., prepared a booklet for use in the industry entitled “Robinson-Patman Guide Book.” This work expresses the following opinion on the question of whether the Robinson-Patman Act “prevents any splitting of brokerage” (p. 74):

“Seller’s broker cannot legally pass any of his commission to the buyer. This would be the same as the seller making the payment. If the broker does split, the seller would be held liable, particularly if he knew about the practice.”¹⁵

It seems apparent from the foregoing that subsection (e) has been generally accepted as prohibiting the splitting of commission by independent brokers, as well as the granting of “dummy” brokerage to the buyer or someone controlled by or affiliated with a buyer. That this should be so is not surprising in view of the fact that the paying or granting of commission, under the indicated circumstances, is made unlawful for “any person,” and not merely for the seller to the buyer or the latter’s affiliate.

In further support of their argument that Section 2(e) was not intended to apply to “pure” brokers, counsel for respondents claim that the Commission has failed to issue any complaint against brokers not affiliated with a buyer, except in one case, *D. J. Easterlin*, Docket No. 6587, and that the complaint there was dismissed by the Commission before hearing, without any reason for its action being specified (33 F.T.C. 1639). Counsel apparently regard the paucity of decisions on the point and the action taken in

¹⁵ The opinion above quoted purports to be based on instructions issued by the Great Atlantic & Pacific Tea Company to its buyers.

the *Easterlin* case as indicative of the Commission's belief that it lacks jurisdiction over "pure" brokers.

Counsel's argument in this respect is not correct since the Commission has issued complaints in at least two other cases, involving the splitting of commissions by brokers representing sellers only, and has in both instances issued order against the brokers. In *W. E. Robinson & Co., Inc.*, 32 F.T.C. 370, the seller's broker was charged with passing on approximately 50 per cent of his brokerage to certain purchasers and was ordered to cease and desist from such practice. In *Custom House Packing Corp.*, 43 F.T.C. 164, a broker having no connection with the buyers, was found to have violated Section 2(c) by passing on part of his commission to such buyers.

The Court of Appeals for the Fourth Circuit has also made it clear that it upholds the Commission's position that Section 2(c) applies to the seller's broker, in *Oliver Brothers, Inc. v. F.T.C.*, 102 F. 2d 736. Although that case involved a payment of brokerage by a seller to a broker representing the buyer, the court in addressing itself to the argument that the broker was rendering a service to the seller and was therefore entitled to a commission, stated (p. 770):

"And even if it were true that Oliver rendered services to the sellers, we do not think that this would [fol. 188] change the situation. No one would contend that, without violating this section, a broker representing the seller could give his commissions to the buyer; for in such case the action of the broker would be the action of his principal, the seller, and would amount to the allowance of commissions by the seller to the other party to the transaction in direct violation of the statutory provision. As we have seen, it constitutes a clear violation of the section for the buyer to receive commissions allowed an agent who represents him alone. If, therefore, the buyer may not receive commissions allowed either his own agent or the agent of the seller, it would seem to follow necessarily that he may not receive commissions allowed a broker who is the agent of both." [Emphasis supplied.]

It is accordingly concluded that Section 2(c) prohibits an independent broker who represents a seller from splitting

with, or passing on to, the buyer any part of the commission or brokerage to which he is entitled under his agreement with the seller.

2. Application of Section 2(c) to respondents' reduction in commission

Counsel for respondents advance the alternative argument that even if Section 2(c) does apply to the splitting of commission by independent brokers, it is not applicable to the facts here since (a) it does not apply to "indirect" payments or allowances to a buyer and (b) respondents' acceptance of a reduction in commission can, in no event, be considered a payment or allowance of brokerage, either direct or indirect.

a. Counsels' argument that the statute does not apply to indirect payments or allowances to a buyer by a broker is based on the fact that the statute, in declaring it to be illegal for any person "to pay or grant" anything of value as a commission to the other party to the transaction does [fol. 189] not use the words "directly or indirectly" after the phrase "to pay or grant." Counsel point out, in this connection, that when Congress wanted to prohibit payments to brokers or agents under the indirect, as well as the direct, control of the other party to the transaction, it was careful to use the expression "subject to the direct or indirect control" of such party. Counsel apparently regard the omission of a similar phrase, in connection with the prohibition on the payment or granting of brokerage, as significant.

While it is true that Congress, out of an abundance of caution, might have inserted the phrase "directly or indirectly" after the language "to pay or grant," the undersigned does not consider its omission to be of any significance. Considering that it was the basic intent of Congress in adding subsections (c), (d) and (e) to the Act to circumvent indirect forms of price discrimination, and in the light of the expressed intent of Congress in the case of subsection (c) to prevent the "abuse of the brokerage function for purposes of oppressive [price] discrimination," the undersigned cannot believe that Congress intended to give Section 2(c) the narrow scope for which respondents argue. On the contrary, the very portion of the legislative history

cited by respondents contains the statement that Section 2(c) "prohibits the *direct or indirect* payment of brokerage except for such services rendered."¹⁶ It is inconceivable that Congress intended to prohibit the seller's broker from making a direct payment of part of his commission to the buyer, but intended to permit the broker to remit such sum to the seller and have the latter, in turn, transmit it to the buyer. Merely to state the proposition is to demonstrate its absurdity.

b. Counsel for respondents further argue that even if the statute applies to indirect, as well as direct, payments, the conduct of respondents here cannot be deemed to fall within either category. Counsels' argument, in substance, is that since the seller was under no obligation to pay respondents [fol. 190] the .5 per cent commission for any specified period of time, and made it a condition of its approval of the sale that they accept a reduction of commission to 3 per cent, respondents actually "earned" only 3 per cent on the sale, and accordingly they cannot be deemed to have paid, granted or allowed any part of their commission to the buyer.¹⁷ Counsel also argue that it was a *sine qua non*, in establishing respondents' connection with the payment or granting of brokerage to the purchaser, to show that respondents had requested the seller to recoup part of its loss out of their commission.

By arguing that they only "earned" 3 per cent commission and, consequently, did not pass on any of their com-

¹⁶ H. R. Rep. No. 2951, 74th Cong., 2d Sess. (1936).

¹⁷ Counsel for respondents point out in the memorandum filed by them that while the complaint charges, as the violation, the "granting or allowing" of a percentage of their brokerage to the buyer, the Act does not use the word "allowing" in referring to the illegal conduct, but uses the expression "pay or grant." Counsel apparently do not urge this variance between the complaint and the statute as the basis for any serious argument. It may be noted, however, that the word "allow" is defined as "to grant as a deduction or an addition" (Webster's New Collegiate Dictionary, 1949 Edition). Consequently, the charge that respondents granted or allowed a part of their brokerage is clearly synonymous with the language used in the Act.

mission to the buyer, respondents are in effect seeking to lift themselves by their own bootstraps. They seek to escape the application of the statute by the very conduct which makes it operative. As has been found above, it was agreed between respondents and their principal that respondents would receive a commission of 5 per cent on sales made by them. This agreement was in effect on October 27, 1954, and, except for sales to Smucker, is still in effect. By accepting a commission of 3 per cent, under the circumstances here present, respondents were giving up part of what they were entitled to receive, with full knowledge of the fact that their contribution would redound to the benefit of the buyer in the form of a price concession. It may be, as counsel for respondents argue, that there is no proof that respondents actually requested the seller to recoup part of the price reduction out of their commission. However, in the light of the economic realities of the situation, this is immaterial.

Respondents were fully mindful of the fact that the going price of Canada Foods' apple concentrate was \$1.30 per gallon. This was the price at which they sold concentrate to every purchaser except Smucker. This was the price which Tenser & Phipps had already quoted to Smucker, to respondents' knowledge, when the latter intervened in the situation and induced Canada Foods to lower its price. Irrespective of whether respondents actively urged Canada Foods to recoup part of the price reduction out of the commission to which they would otherwise have been entitled, they were fully cognizant of the fact that their acceptance of a reduced rate of commission was a material factor in making possible the sale to Smucker at a reduced price. As the agent for Canada Foods, respondents are equally guilty with their principal of contributing to the price concession which the latter gave to the purchaser. The fact that the principal is beyond the jurisdiction of the Federal Trade Commission, by reason of its situs in Canada, does not absolve the agent from liability for his participation in the transaction.

It may be, as argued by counsel for respondents, that the original agreement between respondents and Canada Foods was not for any specified duration and could have been terminated or modified. However, what is involved here

is not merely a modification of an existing agreement with respect to commission, but a dropping of commission on sales to a single purchaser, combined with a reduction in price to that purchaser under circumstances where it is clear that the reduction in commission was a concomitant of, in fact was the *quid pro quo* for, the reduction in price. Respondents' acceptance of a lower commission, under such circumstances, is as much a payment of part of their commission to the purchaser as if respondents had directly [fol. 192] paid 2 per cent of their commission to the purchaser.

It may also be, as argued by counsel for respondents, that had they not accepted the 3 per cent they might not have made the sale. However, the choice with which respondents were confronted was largely of their own making since had they not intervened in the situation, it seems quite probable that Tenser & Phipps would have made the sale at the going price, and at their agreed rate of commission. Respondents' conduct, under these circumstances, tends to point up the vice involved in the splitting of commissions as a competitive weapon. In any event, the fact that respondents' conduct was motivated by economic reasons cannot be deemed a legal justification for what they did.¹⁸

c. Counsel for respondents argue, finally, that whatever benefit the buyer may have received when respondents accepted a 3 per cent commission instead of 5 per cent, it did not involve the granting or allowing of commission or brokerage or of any sum in lieu thereof. Counsel's argument appears to be that because a portion of respondents' commission reached the purchaser in the form of a price concession, it cannot be deemed to fall within the proscription of Section 2(c). This argument is wholly without merit.

What the statute prohibits is the payment or allowance to the buyer of "anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof." Under this broad language it is not neces-

¹⁸ *Fashion Originators' Guild v. F.T.C.*, 312 U.S. 457, 468; *Wholesale Dry Goods Institute v. F.T.C.*, 139 F. 2d 230 (C.A. 2, 1943), cert. den. 321 U.S. 770.

sary that the payment be labeled as commission or brokerage. In the instant case the price reduction to the purchaser involved partly an actual price reduction by the seller and partly a portion of the brokerage commission which respondents permitted the seller to retain in order to make possible the full reduction sought by the buyer. Certainly the portion of the price concession to which respondents contributed may be deemed an allowance or [fol. 193] discount in lieu of commission or brokerage, within the meaning of the statute. In fact, if not for such concession on respondents' part, it appears unlikely that there would have been any price reduction to the purchaser.

In both the *Custom House Packing Corporation* case and the *W. E. Robinson & Co.* case, *supra*, the splitting of commission took the form not merely of the transmission of part of the broker's commission to the purchaser, but also was effected indirectly through equivalent price reductions. The latter practice was also considered to be in violation of Section 2(c) and, in the *Robinson* case, the order specifically prohibited a reduction in price which reflected the part of the brokerage payment to which the broker was entitled.

Concluding Finding

Based on the facts hereinabove found, it is concluded and found that respondents, and each of them, have since October 27, 1954, granted and allowed, and are now granting and allowing, directly or indirectly, a portion of the commission or brokerage fee to which they are entitled from their seller principal, Canada Foods Ltd., to the J. M. Smucker Company, a buyer of food products in commerce, in connection with such buyer's purchase of food products in commerce.

3. The question of constitutionality

Counsel for respondents contend that Section 2(c), as applied to the acts and practices here involved, is in violation of the due process clause of the Fifth Amendment because it constitutes an arbitrary discrimination against them. When reduced to its essence, respondents' argument

is that by denying them the right to meet the competition of other brokers who charge a lower rate of commission, Section 2(c) discriminates against them and hence violates the Fifth Amendment.

Aside from the fact that an administrative agency is required to assume the constitutionality of the laws it administers, the short answer to counsels' contention is that it was laid at rest many years ago in the *Oliver Brothers* case, *supra*. In that case it was contended that Section 2(c) violated the Fifth Amendment because it did not permit [fol. 194] the use of the defensive measures provided with respect to Section 2(a), such as the meeting of competition. In response to this argument the Court of Appeals stated (p. 768):

"And we are not impressed with the argument that when construed without the limitation prescribed by 2(a) section 2(c) is violative of the due process clause of the Fifth Amendment. It is addressed to a definite evil in interstate trade and commerce which Congress has full power to regulate. It is uniform in operation and applies to all persons alike. It is not arbitrary or unreasonable, but is directed toward the elimination of hidden discriminations in price which are thought to be injurious to the proper operation of a free competitive system of trade and commerce and to have a tendency to promote unreasonable restraints and monopolization."

To this it need only be added that Section 2(c) does not require any broker to charge any particular rate of commission. If respondents desire to reduce their rate of commission, they are not denied the right to do so under Section 2(c), except insofar as they use such reduction as a vehicle for granting or allowing something to the buyer to which Congress has stated the buyer is not entitled.

CONCLUSION OF LAW

It is concluded that respondents, and each of them, by engaging in the acts and practices hereinabove found have violated, and are now, violating, the provisions of subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

ORDER

It Is Ordered that respondents Henry Broch and Oscar Adler, copartners trading as Henry Broch & Co., their representatives, agents, or employees, directly or through any corporate or other device, in connection with the sale of food or food products for Canada Foods Ltd., or any other [fol. 195] seller principal, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

(1) Paying, granting or allowing, directly or indirectly, to The J. M. Smucker Company, or to any other buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, any allowance or discount in lieu of brokerage, or any part or percentage thereof, by selling any food or food products to such buyer at prices reflecting a reduction from the prices at which sales of such foods are currently being effected by respondents for Canada Foods Ltd. or any other seller principal, as the case may be, where such reduction in price is accompanied by a reduction in the regular rate of commission, brokerage or other compensation currently being paid to respondents by such seller principal for brokerage service; or

(2) In any other manner, paying, granting or allowing, directly or indirectly, to The J. M. Smucker Company, or to any other buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage or other compensation or any allowance or discount in lieu thereof upon, or in connection with, any sale of food or food products to such buyer for its own account.

/s/ John Lewis, Hearing Examiner.

February 26, 1957.

[fol. 196] BEFORE THE FEDERAL TRADE COMMISSION

NOTICE OF INTENTION TO APPEAL—Filed March 13, 1957

Notice is hereby given that Henry Broch and Oscar Adler, copartners trading as Henry Broch & Co., respondents above named, intend to appeal to the Federal Trade Commission from the Initial Decision of Hearing Examiner John Lewis, entered in this cause on February 26, 1957, and served on said respondents on March 6, 1957.

Dated: March 11, 1957.

/s/ Harold Orlinsky and Fred Herzog, Attorneys
for Respondents.

[fol. 197] BEFORE THE FEDERAL TRADE COMMISSION

FINAL ORDER—Dec. 10, 1957

This matter having been heard by the Commission upon respondents' appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto; and the Commission having rendered its decision denying the appeal of respondents and adopting the initial decision as the decision of the Commission:

It is ordered that respondents Henry Broch and Oscar Adler shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist contained in the initial decision.

By the Commission.

/s/ Robert M. Parrish, Secretary.

Issued: December 10, 1957.

BEFORE THE FEDERAL TRADE COMMISSION

OPINION OF THE COMMISSION—December 10, 1957

By Anderson, Commissioner:

Respondents have appealed from the hearing examiner's initial decision which, on the basis of findings of fact therein made, concluded that respondents had violated Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act.¹ The initial decision contains an order to cease and desist which would prohibit respondents from:

[fol. 198] “(1) Paying, granting or allowing, directly or indirectly, to The J. M. Smucker Company, or to any other buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, any allowance or discount in lieu of brokerage, or any part or percentage thereof, by selling any food or food products to such buyer at prices reflecting a reduction from the prices at which sales of such foods are currently being effected by respondents for Canada Foods Ltd. or any other seller principal, as the case may be, where such reduction in price is accompanied by a reduction in the regular rate of commission, brokerage or other compensation currently being paid to respondents by such seller principal for brokerage services; or

“(2) In any other manner, paying, granting or al-

¹ Section 2(c) provides that:

“... it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.”

lowing, directly or indirectly, to The J. M. Smucker Company, or to any other buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage or other compensation or any allowance or discount in lieu thereof upon, or in connection with, any sale of food or food products to such buyer for its own account."

The gravamen of the complaint is that respondents granted and allowed a buyer, the J. M. Smucker Company, referred to in the above-quoted order, a percentage of respondents' commission or brokerage fee in connection with such buyer's purchase of apple concentrate from Canada Foods. The complaint charges that in making such sale, respondents, as brokers, earned their normal and customary commission, or brokerage fee, of five per cent but did [fol. 199] not receive all of such normal brokerage, accepting instead a three per cent commission, and that respondents' seller principal thereupon lowered its established price, recouping part of the reduction out of the brokerage fee which respondents would have earned at their normal brokerage fee of five per cent. It is further alleged that such transaction resulted in the granting or allowing by respondents (brokers) of a percentage of their commission or brokerage fee, directly or indirectly, to a buyer of food products, thus breaching the statute.

The record discloses, respondents admit and the hearing examiner found that the seller principal, Canada Foods, first agreed to pay respondents a brokerage fee of five per cent, but respondents contend that this was based on much smaller quantities than the sale in question of 500 steel drums of apple concentrate. Respondents also admit that their seller-principal originally quoted to the buyer a price of \$1.30 per gallon, which subsequently was reduced and the sale to the buyer consummated at a lower price of \$1.25, with respondents accepting a brokerage fee of three per cent instead of five per cent. It appears to be respondents' further position that the reduced price obtained because of competitive conditions and that the reduction in brokerage resulted from the unilateral action of the principal and not by reason of any request by respondents.

[fol. 213] IN THE UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

No. 12305 SEPTEMBER TERM, 1958 SEPTEMBER SESSION, 1958,

HENRY BROCH AND COMPANY, a co-partnership consisting of
Henry Broch and Oscar Adler, Petitioners,

v.

* FEDERAL TRADE COMMISSION, Respondent

Petition for Review of Order of the Federal Trade
Commission

OPINION—December 11, 1958

Before DUFFY, *Chief Judge*, and SCHNACKENBURG and
HASTINGS, *Circuit Judges*:

SCHNACKENBURG, *Circuit Judge*. Henry Broch and Oscar Adler, copartners trading as Henry Broch & Company, herein called petitioners or Broch, ask us to review the action of the Federal Trade Commission and set aside its cease and desist order of December 10, 1957, issued pursuant to a complaint charging petitioners with violation of §2(c) of the Clayton Act, as amended by the Robinson-Patman Act.¹

The complaint charged, in substance, that petitioners, while engaged in commerce as a broker or sales agent for seller principals, violated §2 (c) by granting and allowing a portion of their normal and customary broker-[fol. 214] age fee to a particular buyer in connection with that buyer's purchase of food products in commerce from a particular seller.

In their answer petitioners admitted that they were engaged in commerce as a broker or sales representative of seller principals; that the then current price of the commodity involved in the sale cited by the complaint was \$1.30 per gallon; that this price was reduced to \$1.25 by the seller in the instance cited; and that, instead of being compensated by the seller at a previously agreed to rate

¹ § 2 (p), 49 Stat. 1527, 15 U.S.C.A. § 13 (c).

of 5%, petitioners accepted a 3% brokerage payment on that sale. All other allegations of the complaint were denied.

Following hearings before an examiner and the filing of his initial decision, containing findings of fact, conclusion, and a cease and desist order, petitioners appealed to the Commission, which adopted the said findings, conclusion and order and entered the order now under attack.

In this court the examiner's findings of fact are not questioned.² The facts appearing therefrom are as follows:

Broch is a broker or sales representative for about 25 principals who sell food products, and negotiates an annual volume of sales approximately \$4,000,000 to \$5,000,000. Among these seller principals is Canada Foods, Ltd., (hereinafter referred to as Canada Foods) a Canadian processor of apple concentrate and similar products. Canada Foods was also represented in the United States by several other brokerage firms, including Tenser & Phipps, Poole & Company, and Cuylar. The sales involved in this case were made to the J. M. Smucker Company, Orville, Ohio (hereinafter referred to as Smucker), a manufacturer of apple butter and preserves.

During negotiations in April and May 1954, when petitioners agreed to act as broker for Canada Foods, their commission on sales was established at 5%. The brokers other than petitioners were appointed with the understanding that their rate of commission would be 4%. Petitioners received a higher rate of commission because they stocked merchandise in advance of sales.

On October 11, 1954, Canada Foods established its price on its 1954 pack of apple concentrate at \$1.30 per gallon in 50-gallon steel drums, and it authorized its various brokers, including petitioners, to negotiate sales at that price.

The first attempt to sell the 1954 pack of Canada Foods'

² We are here confronted with our duty to apply the law to the facts and to determine whether respondent's process of legal reasoning when applied to the facts is correct. *Standard Oil Co. v. Federal Trade Commission*, 233 F. 2d 649, 651, affirmed 355 U.S. 396; *Atalanta Trading Corp. v. Federal Trade Commission*, 258 F. 2d 365, 368.

In view of the disposition we make of the case, we find it unnecessary to pass on any questions except the legal issues involved in this appeal. We have reviewed the whole record herein and are satisfied that the hearing examiner's findings as to the facts are fully supported by the record made. Some of those findings are based on conflicting testimony and evidence. As to those, giving proper weight to the hearing examiner's findings, based as they are on the complete record in the case, including all exhibits and testimony, and considering especially that the hearing examiner had full opportunity to observe the bearing and demeanor of the witnesses, we are constrained to conclude from our view of the record that he correctly weighed and resolved the conflicting evidence. We will, therefore, refer but [fol. 200] briefly to the salient ultimate facts found wherever necessary by way of explanation of our disposition of the legal points raised on this appeal.

The principal issue presented is whether sub-section 2(c) of the Clayton Act, as amended, encompasses the passing on of all or part of brokerage commissions by a seller's broker to the buyer. The respondent contends that the brokerage clause reaches only illicit grants made *directly* to buyers and that in the transaction involved here, where the broker "acquiesced" in a lower rate of commission by his seller principal, it is not a payment or a grant of brokerage allowance on respondent broker's part and in no event runs to the buyer in the transaction.

Respondents in this connection argue that a price reduction to a buyer by a seller cannot constitute an allowance "in lieu of brokerage" within the meaning of Section 2(c) unless directly correlated with a brokerage commission in both conception and amount and cites that principle as the rationale of the Commissioner's decision in the matter of *Main Fish Company, Inc.*, Docket No. 6386 (decided July 30, 1956).

Directing attention first to respondents' contention that subsection 2(c) relates only to discriminatory practices on the part of sellers and buyers and enacts no liability for independent seller's brokers, we have first to ascertain the over-all legislative objective of the Robinson-Patman amendment to the Clayton Act. Section 2 of the Clayton Act, which was the section amended, merely interdicted

generally discrimination in price where the effect thereof was substantially to lessen competition or tend to create monopoly. As was said by the U. S. Court of Appeals, Fourth Circuit, in *Oliver Bros., Inc., et al. v. Federal Trade Commission*, 102 F. 2d 763, 767:

"The Robinson-Patman Act broadened the scope of this provision, conferred upon the Federal Trade Commission power to establish quantity differentials for the purpose of determining discrimination, and cast the burden of proof upon one charged with discrimination to justify any discrimination shown. Receipt of price discrimination was made unlawful for the first [fol. 201] time, section 2(f), 15 U.S.C.A. Sec. 13(f), and three specific matters were forbidden as unfair trade practices by subsections (c), (d) and (e), viz: *the granting of commission or brokerage, or any allowance in lieu thereof, to the other party to the transaction or his agent*, the making of discriminatory payments by seller to buyer for services rendered by the latter and discrimination by the seller in the rendering of services to the buyer.

.

"No one would contend that, without violating this section, a broker representing the seller could give his commissions to the buyer; for in such case the action of the broker would be the action of his principal, the seller, and would amount to the allowance of commissions by the seller to the other party to the transaction in direct violation of the statutory provision." [Emphasis supplied.]

It is the opinion of the Commission that the language of subsection (e) is so clear that it is unnecessary to resort to the reports of Congress to ascertain what was intended, *Oliver Bros. v. Federal Trade Commission*, *supra*, and that it is the office of that subsection to outlaw the diversion of brokerage to buyers, or any form of commission or sales compensation, to buyers in any manner, directly or indirectly, from any source. Reflection upon the climate which produced the Clayton Act, as amended by the Robinson-Patman Act, leads but to the conclusion that the in-

tendment of that legislation is to establish the public policy of eliminating as a violation of law the practice of discriminating in price, whether it be done directly or indirectly.² It is our view that this public policy prohibits a [fol. 202] broker, acting solely for the seller and not controlled by the buyer, from passing on, directly or indirectly, to the buyer any part of his brokerage. The words of the statute are plain and mean what they say in aid of effectuating the general over-all intent of the Robinson-Patman amendment of the Clayton Act. In the *Great Atlantic & Pacific Tea Company* case [106 F. 2d 667, 674], the court said succinctly:

“At each stage of its enactment, paragraph (c) was declared to be an absolute prohibition of the payment of brokerage to buyers or buyers’ representatives or agents. *Such is the plain intent of the Congress and thus we construe the statute. Any other result would frustrate the intent of Congress.*” [Emphasis supplied]

The Commission, in view of the foregoing, rejects the contention, implicit in respondents’ argument in support of their appeal, that subsection 2(c) of the Clayton Act, as

² Invoice prices by Canada Foods, Ltd., on sales of apple concentrate through its broker, respondent *Henry Broch & Co.*, is disclosed by reference to Comm. Ex. 5-9, incl., 11 and 13, in summary, as follows:

Date	Drums	Customer	Per Gal.
12/ 3/54	50	Owen & Mowrey, Inc.	\$1.30
12/ 3/54	50	Adler Foods Co.	1.30
12/ 9/54	50	J. M. Smucker Co.	1.25
1/ 8/55	75	J. M. Smucker Co.	1.25
1/26/55	75	J. M. Smucker Co.	1.25
2/15/55	75	J. M. Smucker Co.	1.25
3/30/55	75	J. M. Smucker Co.	1.25
5/ 1/55	200	J. M. Smucker Co.	1.25

Also, Comm. Ex. 16A, 16B and 17 disclose that in 1954-1955, brokerage commissions were paid to respondent *Henry Broch & Co.* by Canada Foods, Ltd., for sales to 18 customers other than J. M. Smucker Co. at the rate of five per cent and for sales to J. M. Smucker Co. during that time at the rate of three per cent.

amended, does not reach the situation disclosed by the record in this proceeding. In this connection, the hearing examiner found in effect, and we think correctly, that [fol. 203] respondent Henry Broch & Co, had a five per cent brokerage agreement with Canada Foods, Ltd., under which it received five per cent brokerage on all other transactions except those with Smucker; that by acquiescence, ratification, confirmation, agreement, or otherwise, respondent Broch accepted a reduction in brokerage from five per cent to three per cent on Smucker transactions; that this brokerage reduction was contemporaneous with the price reduction by Canada Foods to Smucker and amounted to a sharing of the price reduction by Broch and Canada Foods. The only reasonable inference possible to be drawn from those facts established of record is that drawn by the hearing examiner to the effect that respondents' acceptance of a reduced brokerage in such circumstances constitutes a payment of part of their commission to the buyer exactly as though respondents had paid two per cent of their commission to the buyer direct.

Turning next to respondents' contention that the Commission's decision in the *Main Fish Company* case, *supra*, is dispositive here and that the decision there cannot logically coexist with the initial decision in this proceeding, we can find no merit in that argument. The two cases are obviously distinguishable.

Respondents correctly summarize our holding in *Main Fish* to be that the simultaneous presence of a reduced price and an eliminated "brokerage" fee could not, in the factual situation there present, generate a presumption that the lower price reflected an "allowance in lieu of brokerage" and that, in the circumstances there found, "the pricing variations were not shown to be arithmetically commensurate with the pattern of brokerage" in other transactions. In so holding, however, the Commission carefully noted that in a given situation it would be possible to infer from surrounding circumstances that the payment of brokerage monies or sums in lieu thereof was the fact. We think that this latter situation obtains here and that the matrix of the factual situation projected by the record presently before us in the instant case clearly gives rise to the inference that respondent Broch instigated and

granted payments in lieu of brokerage to the buyer Smucker. In other words, we find here that the price re-[fol. 204]ductions convincingly are shown to be commensurate with the pattern of brokerage involved. The *Main Fish Company* case, *supra*, is not controlling here.

Respondents, while admitting that Canada Foods first agreed to pay them a brokerage fee of 5%, contend that this was based on much smaller quantities than the principal sale involved here of 500 steel drums of apple concentrate. If respondents are seeking to resort to the cost differential provisos of subsection (a) of Section 2 of the Act, we hold that such contention is without merit. The complaint in this proceeding was issued under subsection 2(c), not under subsection 2(a), and the several defenses available to price discrimination charges under subsection 2(a) are not applicable to a proceeding under subsection 2(c). The latter is complete on its face and establishes a convention or principle of illegality entirely separate from and independent of the remaining subsections of Section 2 of the statute. The Commission and the courts have consistently so held.³

Respondents finally argue that the proceeding here is not in the public interest and must be dismissed because it is a private controversy between Broch & Co. and the broker who allegedly lost to respondent a sale to a potential buyer; in other words, that a private wrong is involved instead of an injury to the public. The answer to this is that such contention ignores the changes made in the Clayton Act by the passage of the Robinson-Patman Act. As the court said in the *Nashville Coal Co.* case:⁴

³ *Biddle Purchasing Co., et al. v. Federal Trade Commission*, 96 F. 2d 687 (C. A. 2, 1938); *Oliver Bros. v. Federal Trade Commission*, 102 F. 2d 763 (C. A. 4, 1939); *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F. 2d 667 (C. A. 3, 1939).

⁴ *Kentucky-Tennessee Light & Power Co. v. Nashville Coal Co.*, 37 F. Supp. 728, 735 (D.C. W.D. Ky., 1941), order enforced *sub nomine Fitch v. Kentucky-Tennessee Light & Power Co.*, 130 F. 2d 12 (C.A. 6, 1943). And see cases cited n. 3, *supra*.

[fol. 205] "The Clayton Act (now Section 2(a)) required a showing of injury to the public. The additions made by the Robinson-Patman Act (Sections 2(c), 2(d), and 2(e)), do not require any such showing in order to make the act illegal."

Respondents' contention that this is a private controversy and, as such, requires dismissal of the proceeding is rejected.

Respondents' appeal is denied and the findings as to the facts, conclusion and order to cease and desist contained in the initial decision are adopted as the decision of the Commission.

December 10, 1957.

BEFORE THE FEDERAL TRADE COMMISSION

COMPLIANCE EXTENSION—February 13, 1958

Federal Trade Commission

Washington 25

Feb. 13, 1958.

Office of the General Counsel

Frederick M. Rowe, Esq.,
Kirkland, Fleming, Green, Martin & Ellis,
World Center Building,
16th & K Streets, N. W.,
Washington 6, D. C.

Re: Henry Broch & Co., et al., Docket 6484

DEAR MR. ROWE:

Receipt is acknowledged of your communication dated February 10, 1958.

For the reason stated therein you are hereby advised that a sixty day extension of time within which respondents must file a written report of the manner and form of [fol. 206] compliance in the above-entitled matter has been

granted and the due date therefor is now considered to be on or before April 19, 1958.

Very truly yours, /s/ P. B. Morehouse, Assistant
General Counsel for Compliance.

cc: Harold Orlinsky, Esq., 11 South La Salle Street,
Chicago 3, Illinois.

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH
CIRCUIT

PETITION TO REVIEW AND SET ASIDE ORDER OF THE FEDERAL
TRADE COMMISSION—Filed April 19, 1958

To the Honorable Judges of the United States Court of
Appeals, for the Seventh Circuit:

Your petitioner, Henry Broch & Company, brings this
action under the provisions of Section 11 of the Clayton
Act (15 U.S.C.-Sec. 21) to review and set aside the order
of the Federal Trade Commission, and respectfully shows:

I

Jurisdiction and Venue

Petitioner, Henry Broch & Company, is a co-partnership
of Henry Broch and Oscar Adler, with its main office and
place of business at 1525 E. 53rd Street, Chicago, Illinois.
Petitioner functions as an independent sales representative
by negotiating the sale of food products for about twenty-
five seller principals.

Respondent, Federal Trade Commission, is a federal ad-
ministrative agency created by Act of Congress.

[fol. 207] This proceeding is brought by petitioner under
Section 11 of the Clayton Act. Venue is based upon the
provision of that section permitting any person, required
by an order of the Federal Trade Commission to cease and
desist, to obtain judicial review by filing a written petition
with the Court of Appeals within the Circuit wherein such
person resides or carries on business. Petitioner's main
business office is within the jurisdiction of the Court of

Appeals for the Seventh Circuit, and it carries on business within this Circuit.

II

Concise Statement of the Nature of the Proceedings

The Federal Trade Commission on January 11, 1956, issued a complaint charging petitioner with violations of Section 2(c) of the amended Clayton Act. According to the complaint, petitioner "granted and allowed" a buyer approximately 60% of brokerage commission "paid" it by a seller principal for its services. More specifically, the complaint alleged that petitioner, in connection with a specified sale of food products, successfully "requested" the seller to lower its established price to the buyer and "to recoup" for itself in part the loss suffered thereby by deducting about 60% of petitioner's normal brokerage commission of 5%.

Petitioner denied the essential allegations of the complaint and denied any liability under the Act.

Hearings were held before a Hearing Examiner on various dates between May 8, 1956, and October 3, 1956, at Chicago, Illinois, and Pittsburgh, Pennsylvania. The oral deposition of the manager of the seller firm was taken on August 6, 1956, at Kentville, Nova Scotia, before a Notary Public, with the Hearing Examiner present as an observer. At the close of the evidence in support of the complaint, counsel for petitioner moved, on the record, to dismiss the complaint on the ground that upon the facts and the law, the Commission had failed to show the right to relief. The Hearing Examiner denied said motion, on the record, without prejudice to its renewal at the close of the entire case. Said motion was renewed at the close of the case and disposed of in accordance with the findings of the Initial Decision [fol. 208]. At the close of all the evidence, and pursuant to leave granted by the Examiner, proposed findings of fact, conclusions of law and order, together with supporting memoranda, were filed by counsel for respondent and counsel for petitioner on November 15 and November 16, 1956, respectively. The Hearing Examiner on February 26, 1957, filed his Initial Decision adjudging a violation of Section 2(c) and accordingly entering an order to cease and desist.

The petitioner on May 31, 1957, submitted an Appeal Brief and in accordance with Federal Trade Commission Rules requested an opportunity for oral argument. On September 24, 1957, the oral argument was heard before the full Commission.

The Commission, on December 10, 1957, denied the petitioner's appeal and entered as its own order the findings as to facts, conclusions and order to cease and desist contained in the Initial Decision.

Hence this petition for judicial review and relief.

III

Grounds for Relief

Petitioner's request for judicial relief is based on the grounds that:

1. The Commission erred in its interpretation and application of Section 2(c) of the amended Clayton Act.

2. The Commission misconstrued Section 2(c) of the amended Clayton Act so as to unlawfully conflict with the objectives of anti-trust policy expressed in the Sherman Act.

3. The Commission's construction of Section 2(c) of the amended Clayton Act violates the Fifth Amendment of the Constitution of the United States in that it arbitrarily denies petitioner the opportunity of competing for business and otherwise discriminates against it and hence deprives it of valuable property rights without due process of law.

4. The Commission's interpretation of Section 2(c) of the amended Clayton Act is contrary both to the intent of Congress as expressed in the legislative history and to the general public interest.

5. The inferences drawn by the Commission based upon the facts of record are erroneous in fact and law.

6. There is no substantial evidence of record which supports the Commission's rulings.

7. The order of the Commission is defective in that it is vague, exceeds the statutory limits of Section 2(c), and as applied would conflict with the Sherman Act.

IV

Relief Prayed

Wherefore, petitioner prays that this Court review the action of the Federal Trade Commission, enter a decree setting aside the agency's findings, conclusions, and order issued on December 10, 1957, as well as directing the Commission to dismiss its complaint against petitioner, and to award such further or alternative relief as the Court may deem equitable and just.

Dated: April 19, 1958.

Respectfully submitted, Henry Broch & Company,
Petitioner, by Frederick M. Rowe of Kirkland,
Fleming, Green, Martin & Ellis Prudential Plaza,
Chicago 1, Illinois and Harold Orlinsky, Fred
Herzog, 11 South La Salle Street, Chicago 3, Illi-
nois, Attorneys for Petitioner.

[fol. 210] IN THE UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

AGREED MOTION AND STIPULATION WITH RESPECT TO FILING
OF BRIEFS AND JOINT APPENDIX

For the reasons detail in the appended affidavits, Henry Broch & Company, petitioner, and the Federal Trade Commission, respondent, by their attorney stipulate and agree that, subject to the approval of the Court, the time for the filing of briefs and appendices in the above-captioned cause be governed by the following schedule:

(a) the petitioner's brief and appendix to be due on August 4, 1958;

(b) the respondent's brief and appendix to be due on September 18, 1958;

(c) the petitioner's reply brief, as provided by the rules of the Court, to be due within fifteen days thereafter, i.e., on October 3, 1958.

Respectfully submitted, Frederick M. Rowe of Kirkland, Fleming, Green, Martin & Ellis, Prudential

Plaza, Chicago 1, Illinois and 800 World Center Building, Washington 6, D. C., Attorneys for Henry Broch & Company.

James E. Corkey, Assistant General Counsel, Attorney for the Federal Trade Commission.

JOINT AFFIDAVIT

FREDERICK M. ROWE and JAMES E. CORKEY, being fully sworn, say:

I, Frederick M. Rowe, am an attorney at law, associated with the firm of Kirkland, Fleming, Green, Martin & Ellis, in Chicago, Illinois, and Washington, D.C. With co-counsel, I represent the petitioner Henry Broch & Company in this case.

[fol. 211] I, James E. Corkey, am Assistant General Counsel of the Federal Trade Commission and represent the respondent Federal Trade Commission in this case.

We make this affidavit in support of the Agreed Motion and stipulation with Respect to Filing of Briefs and Joint Appendix.

The basis for the Agreed Motion and Stipulation with Respect to Filing of Briefs and Joint Appendix, is, first; that we are presently negotiating for the purpose of arriving at an understanding which would enable the parties to simplify the Court's review and their own briefing and printing by filing a joint appendix.

Also, this proceeding is based on a sizeable record and a number of exhibits. It involves complex legal issues of statutory interpretation of great potential significance to the administration and enforcement of one of the antitrust laws of the United States.

In our opinion, these legal complexities, together with the necessary legal research and negotiation for a joint appendix, support and require the enlargement for the filing of briefs and appendices requested and agreed to by the parties in their Agreed Motion and Stipulation with Respect to Filing of Briefs and Joint Appendix.

Frederick M. Rowe. Subscribed and sworn to before me this — day of —, 1958. — —, Notary Public.
My commission expires: — —, —.

James E. Corkey. Subscribed and sworn to before me this — day of —, 1958. — —, Notary Public,
My Commission expires: — —, —.

[fol. 212] UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

Before Hon. E. Ryan Duffy, Chief Judge

No. 12305

HENRY BROCH AND COMPANY, Petitioner,

vs.

FEDERAL TRADE COMMISSION, Respondent

Petition for Review of an Order of the Federal Trade
Commission

ORDER RE BRIEFS AND APPENDICES—June 14, 1958

On consideration of the agreed motion and stipulation with respect to the filing of briefs and appendices, It Is Ordered:

- (a) That the petitioner's brief and appendix are to be filed by August 4, 1958;
- (b) That the respondent's brief and appendix are to be filed by September 18, 1958;
- (c) That petitioner's reply brief be filed within fifteen (15) days thereafter, i. e., on October 3, 1958.

apple concentrate to Smucker was made, not by petitioners, but by Phipps (of Tenser & Phipps) who contacted Smucker on or about October 1, 1954, several weeks before petitioners first contacted that buyer. Upon receiving the quotation on October 11, 1954, Phipps advised Smucker of the \$1.30 price set by Canada Foods.

At some time between October 15 and 18, 1954, Smucker told Phipps that it was interested in purchasing approximately 500 barrels of the concentrate, but at a price lower than \$1.30. This counter-proposal was transmitted to Canada Foods by Phipps on or about October 18, 1954, and was discussed in person with Canada Foods' manager on October 19, 1954. Canada Foods' manager told Phipps that \$1.30 was Canada Foods' best price and that if it were not for a subsidy on apples by the Canadian Government, Canada Foods could not sell even at that low price. This decision of Canada Foods to hold to its established \$1.30 price on the Smucker offer was immediately transmitted by Phipps to Smucker. On October 20, 1954, Phipps attempted to secure a 10-day option from Canada Foods for Smucker on 500 to 700 barrels of apple concentrate at the \$1.30 price. Canada Foods replied by letter of October 25, 1954, refusing even to hold the \$1.30 price for the period requested. In its estimation, the price was liable to rise.

As late as October 26, 1954, Smucker specifically offered to purchase through Phipps 500 gallons of Canada Foods' concentrate at \$1.25. Phipps wired the offer to Canada Foods that same day. On October 27, 1954, Canada Foods' manager telephoned Phipps, again stating that his lowest price was \$1.30, and that the only way that the price could be lower would be if the brokerage was [fol. 216] cut. Phipps relayed the information to Smucker, explaining that the order at \$1.25 could not be confirmed since Phipps was afraid that this would constitute a violation of the Robinson-Patman Act.

A day or two before this last related event of October 27, 1954, Broch contacted Smucker in an effort to sell apple concentrate on behalf of Canada Foods. Smucker told Broch that it already had an offer from Canada Foods for \$1.30 but that it would be interested in buying 500 drums at a lower price. With knowledge that Canada Foods, through another broker, was already negotiating to sell

Smucker approximately 500 drums of concentrate and was holding to its \$1.30 price, Broch called Canada Foods and stated it could make the sale if the price were \$1.25 per gallon. Canada Foods took the proposition under advisement. On the following day, October 27, 1954, the day Canada Foods told Phipps that the price could be reduced below \$1.30 only if brokerage were cut, Canada Foods telephoned Broch and advised that it would make the sale at \$1.25 per gallon provided Broch would agree to reduce its commission from 5% to 3%. Broch agreed and advised Smucker that Canada Foods would sell to it at \$1.25 per gallon. The sale of 500 steel drums of apple concentrate at \$1.25 per gallon was consummated, delivery made, and Broch received 3% brokerage rather than the usual 5%.

The order contained in the examiner's initial decision and adopted by respondent required Broch to cease and desist from "paying * * * Smucker, * * * any allowance or discount in lieu of brokerage * * * by selling * * * to such buyer at prices reflecting a reduction * * *, where * * * accompanied by a reduction in the regular rate of commission, brokerage * * * being paid to [petitioners] by such seller principal for brokerage service; * * *."

The examiner's conclusion, which was adopted by the Commission, is that petitioners "granted and allowed, and are now granting and allowing, directly or indirectly, a portion of the commission or brokerage fee to which they are entitled from their seller principal, Canada Foods * * * to * * * Smucker * *, a buyer of food products in commerce, in connection with such buyer's purchase of food products in commerce."

[fol. 217] Before this court, counsel for respondent has specified the following language from §2(c)³ as the basis for the order now being reviewed:

"That it shall be unlawful for any person engaged in commerce, * * * to pay or grant * * * anything of

³ 15 U.S.C.A. § 13(c), which reads:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allow-

value as a commission, brokerage, * * * or any allowance or discount in lieu thereof, * * * either to [or from] the other party to such transaction * * *."

In so specifying, respondent's counsel stated that he was interpolating the words "or from" following the word "to" in the phrase "to the other party." Of course, we do not concede that counsel has a right to add words that Congress failed to use.

The order of December 10, 1957 cannot stand.

Neither the language of §(2) or (c) nor its legislative history⁴ indicates that a seller's broker is covered by § 2 (c). Accordingly we hold that petitioner, as seller's broker, did not violate § 2(c). In arriving at this result, we have carefully considered *Oliver Bros., Inc. v. Federal Trade Commission*, 102 F. 2d 763, *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F. 2d 667, and *Quality Bakers of America v. Federal Trade Commission*, 114 F. 2d 393, principally relied on by respondent. Each of these cases involved buyers' purchasing agents who were charged with receiving brokerage commissions from the sellers, which they passed on to the buyers. This fact is emphasized in the *Great A. & P.* case, at 674, where the court said:

[fol. 218] " * * * The question presented for our consideration is simply whether or not the vendee may be compensated for services rendered by the vendee's agent acting as agent for the vendors. * * *"

ance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

⁴ 80 Cong. Rec. 6281-82 (1936). See also 80 Cong. Rec. 3114, 7759-60 (1936); and Hearings Before the House of Representatives Judiciary Committee on Bills to Amend the Clayton Act, 74th Cong., 1st Sess. 37, 218, 258 (1935).

In the case before us, no agent of the buyer is involved. Petitioner is an agent solely of the seller.

Respondent did not proceed against the buyer or the seller. Instead it interested itself in a private grievance between rival brokers, Tenser & Phipps and Broch. We doubt whether the public interest, which is involved in the Act, can be said to have been served by this proceeding against the seller's broker.

In *Federal Trade Comm. v. Klesner*, 280 U.S. 19, 28, the court said:

“ * * * But the mere fact that it is to the interest of the community that private rights shall be respected is not enough to support a finding of public interest. To justify filing a complaint the public interest must be specific and substantial. Often it is so, because the unfair method employed threatens the existence of present or potential competition. * * * ”

The effect of respondent's order is that the commissions of a seller's broker are rendered immune from reduction by the seller when it is negotiating for the sale of its food products, and hence such a reduction, when used as a basis for quotation of a lower price, is illegal. This would be true even though the buyer does not suggest or even know of the reduction in the seller's brokerage commission, as in the case at bar.⁵

Respondent relies heavily upon respondent's adoption of a finding by the examiner that the only reasonable inference possible is that Broch's acceptance of a reduced brokerage constituted a payment of part of their commission to Smucker, exactly as though Broch had paid 2% “of their commission to the buyer direct.” However, even if the seller were enabled to reduce its price to Smucker, on an extraordinarily large order, because of an agreement by seller's employees, its landlord or its advertising [fol. 219] agency, to reduce their salaries, rent or fees, it would not be the equivalent of a “direct” payment by the employees, the landlord or the advertising agency, to

⁵ This was established by the testimony of purchasing agent Kiefer of Smucker.

Smucker, the buyer. The most that can be said is that, because of Broch's agreement to reduce its commission, the seller was able to reduce its price. Neither in substance nor in fact, directly or indirectly, did Broch pay anything to Smucker.

Respondent's interpretation of § 2(c) would actually promote price rigidity and uniformity contrary to the national antitrust policy. In *Federal Trade Commission v. Reed*, 243 F. 2d 308, cert. denied, 355 U.S. 823, we said, at 309:

"* * * the history, purpose and decisional law concerning the Clayton and Federal Trade Commission Acts demonstrates that they are in pari materia—to be read and construed as one in such manner as to best effectuate the purpose of Congress in enacting them. * * *"

Obviously an important element in the cost of food distribution is the commission paid by sellers to their brokers. If a seller is to be forbidden to meet competition by reducing an item in its cost of distribution, then to that extent his costs are frozen without regard for the welfare of the public which must ultimately defray the resultant costs of distribution.⁶ Trade restraints in the distribution of groceries surely do not occupy a preferred antitrust position, as distinguished from comparable situations. *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231, 248-250 (1951), 233 F. 2d 649 (7th Cir. 1956), aff'd, 355 U.S. 396 (1958).

For the foregoing reasons, the order of the Federal Trade Commission entered December 10, 1957 is set aside.

Order Set Aside.

⁶ Cf. *Simplicity Pattern Co. v. Federal Trade Commission*, 258 F. 2d 673, 683. Cert. granted Nov. 24, 1958, U.S.

[fol. 220] IN UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

Before Hon. F. Ryan Duffy, Chief Judge; Hon. Elmer J.
Schnackenberg, Circuit Judge; Hon. John S. Hastings,
Circuit Judge

No. 12305

HENRY BROCH & COMPANY, etc., et al., Petitioners,

vs.

FEDERAL TRADE COMMISSION, Respondent

Petition for Review of an Order of the Federal Trade
Commission.

JUDGMENT—December 11, 1958

This cause came on to be heard on the petition for review of an order of the Federal Trade Commission, and the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the order entered in this cause by the Federal Trade Commission on December 10, 1957 be, and the same is hereby, set aside, in accordance with the opinion of this Court filed this day.

[fol. 221] Clerk's Certificate to foregoing Transcript
omitted in printing.

[fol. 222] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF
CERTIORARI—March 2, 1959

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 9th, 1959.

Tom Clark, Associate Justice of the Supreme Court
of the United States.

Date this 2nd day of March, 1959.

[fol. 223] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—June 15, 1959

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

COMMISSION'S EXHIBITS NOS. 1A, 1B, 1C AND 1D

227 D. B. BERELSON & CO.—Co-broker for following accounts:

244 California St.

San Francisco 11, Calif.

John Inglis Frozen Foods

706 E. Lindsey

Stockton, Calif.

Product: Vegetables—Strawberries

Brokerage: 3%

Driscoll Strawberry Associates

P.O. Box 308

San Martin, California

Product: Strawberries

Brokerage: 3%

El Monte Rabbit Co.

1641 N. Cogswell Rd.

El Monte, California

Product: Rabbits

Brokerage: 3%

Gershon Trading Co.

New York, N.Y.

Product: Rabbits

Brokerage: 3%

Ore-Ida Potato Products, Inc.

P.O. Box 60

Ontario, Oregon

Product: French Fry Potatoes—Potato Patties

Brokerage: 3%

FLORIDA CITRUS CANNERS COOPERATIVE

P.O. Box 112

Lake Wales, Florida

Product: Concentrated Fruit Juices—Orange—Grapefruit—

Tangerine—Limeade

Brokerage: 3%

228 MUTUAL CITRUS PRODUCTS CO., INC.

424 S. Atchison St.

Anaheim, Calif.

Product: Jelly—Jam Pectins—Powdered Lemon—Powdered Orange

Brokerage: 5%

WESTERN FROZEN FOODS CO.

P.O. Box 690

Watsonville, Calif.

Product: Vegetables

Brokerage: 4%

BAUER & LOEWY TRADING CORP.

82 Beaver Street

New York, N.Y.

Product: Cocoa

Brokerage: 1% to 3% according to volume and selling price of product.

FRIGID FOOD PRODUCTS, INC.

1599 E. Warren Ave.

Detroit 7, Michigan

Product: Fruits

Brokerage: 3%

PEARL ORANGE FRUIT EXCHANGE

Benton Harbor, Michigan

Product: Fruits

Brokerage: 3%

SMITH SALES COMPANY

P.O. Box 518

Clearfield, Utah

Product: Peas

Brokerage: 3%

RICO, INC.

612 E. Overland St.

El Paso, Texas

Product: Strawberries

Brokerage: 5½%

229 CANADA FOODS LIMITED

Fruit Division

Kentville, Nova Scotia

Product: Apple Concentrate

Brokerage: 5%

FROST KING FOODS, INC.

8th & Jones

Paducah, Ky.

Product: Fruits

Brokerage: 1/2¢ per lb.

SODUS FRUIT EXCHANGE

Sodus, Michigan

Product: Fruits

Brokerage: 3%

MICHIGAN FRUIT CANNERS, INC.

Fennville, Michigan

Product: Fruits

Brokerage: 3%

CHAPMAN FROZEN FOODS

1114 D Street

Modesto, California

Product: Vegetables

Brokerage: 3%

CURTICE BROTHERS CO.

328 Main St., East

Rochester, N.Y.

Product: Vegetables

Brokerage: 3%

CALIFORNIA FROZEN FOODS, INC.

P.O. Box 1492

Modesto, California

Product: Strawberries

Brokerage: 3%

GEORGE W. HAXTON & SON, INC.

Oakfield, New York

Product: Fruits

Brokerage: 3%

230 PACIFIC NATIONAL FOODS, INC.—Co-broker for
following accounts

548 First Ave., S.
Seattle 4, Washington

Fisher & Son
2045 Milwaukee Ave.
Puyallup, Wash.

Product: Fruits
Brokerage: 2%

R. I. Rickdall
P.O. Box 307
Burlington, Wash.

Product: Strawberries
Brokerage: 2%

Anacortes Frozen Foods, Inc.
3rd & R.

Anacortes, Wash.

Product: Strawberries
Brokerage: 2%

Albany Food Products, Inc.
3511 Dunlap
Albany, Oreg.

Product: Fruits
Brokerage: 2%

A. F. MURCH CO.
Paw Paw, Mich.

Product: Grapes—grape products
Brokerage: 3%

231 COMMISSION'S EXHIBIT No. 18

D. 6484—Henry Broch & Co. Comparison of Quoted and Invoiced Prices on Sales of Apple Concentrate by Canada Foods, Ltd. to J. M. Smucker Co.; Brokerage Fees Computed on Quoted and Invoice Prices; and Contribution by Seller and Broker in Reduction of Price to Customer

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)
Date of invoice	Invoice commission exhibit	Customer	Quantity purchased (gals.)	Current (F.O.B. New York) price per gal.	Total current price	Regular 5 percent brokers commission	Invoice price to customer per gal.	Invoice net price	Actual 3 percent brokers commission earned	Total price reduction (\$0.05 per gal.) (col. 6 minus col. 9)	Amount of brokerage concession made by Henry Broch & Co. to Smucker (col. 7 minus col. 10)	Amount of price concession allowed by Canada Foods, Ltd. to Smucker (col. 11 minus col. 12)
12/9/54	F	J. M. Smucker Co.	2,968	\$1.30	\$3,858.40	\$192.92	\$1.25	\$3,710.00	\$111.30	\$148.40	\$81.62	\$66.78
1/8/55	F-1	do	4,431	1.30	5,760.30	288.01	1.25	5,538.75	166.16	221.55	121.85	99.70
1/26/55	F-2	do	4,443.41	1.30	5,776.43	288.82	1.25	5,554.28	166.63	222.17	122.19	99.98
2/15/55	F-3	do	4,434.38	1.30	5,764.69	288.23	1.25	5,542.98	166.29	221.71	121.94	99.77
3/30/55	F-4	do	4,447.65	1.30	5,781.95	289.10	1.25	5,559.56	166.79	222.39	122.31	100.08
5/1/55	F-5	do	11,865	1.30	15,424.50	771.23	1.25	14,831.25	444.94	593.25	326.29	266.96
Totals			32,589.44		42,366.27	2,118.31		40,736.80	1,222.11	1,629.47	896.20	733.27

550 drums apple concentrate = 32,589.44 gals.

1 drum apple concentrate = 59.25 gals.

	Amount	Percent of price reduction
Summary:		
Broker's reduction in commission, col. 12.....	\$896.20	55
Seller's net reduction in price, col. 13.....	733.27	45
Total reduction in price, col. 11.....	1,629.47	100
	Cents per gal.	
Broker's contribution to reduction in price (55% of 5¢).....	2.75	
Seller's contribution to reduction in price (45% of 5¢).....	2.25	
Total reduction in price per gal.....	5.00	
	Amount	Percent of regular commission
Broker's 3% commission earned.....	\$1,222.11	57.7
Commission given up by broker—Conceded to buyer.....	896.20	42.3
Total regular (3%) broker's commission.....	2,118.31	100.0

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COMMISSION'S EXHIBIT No. 23

OCTOBER 14, 1954.

CANADA FOODS LIMITED,
Kentville, Nova Scotia.

Attention: Mr. L. Koldinsky.

DEAR MR. KOLDINSKY: Acknowledging receipt of your wire
regards Apple Concentrate at \$1.30.

We will advise you on this as soon as possible.

Very truly yours,

TENSER & PHIPPS,
W. L. LUCAS.

WLL:mc

NOVEMBER 15, 1954.

CANADA FOODS LIMITED,
Kentville, Nova Scotia.

Attention: Mr. L. Koldinsky.

DEAR MR. KOLDINSKY: We acknowledge your wire of the 16th saying you will have a few hundred barrels or drums of Apple Concentrate available and sell subject to confirmation.

Will you please give us the latest shipping date at prices quoted.

We have several others interested.

Very truly yours,

TENSER & PHIPPS,
A. J. PHIPPS.

AJP:mc

MAY 5, 1954.

CANADA FOODS LIMITED,
FRUIT DIVISION,
Kentville, Nova Scotia.

Attention: Mr. L. Koldinsky.

DEAR MR. KOLDINSKY: Thanks very much for your kind letters of April 21 and 28. Please pardon the delay in answering same. Your letters were held for the personal attention of the writer who has just returned to the office after an extensive trip away from the city.

Naturally, we are very pleased that you are appointing us as your executive agents for the Mid-Western territories and rest assured that we will do the right kind of job for you.

We are one of the largest Frozen Food Brokers in the United States and our vast connections with the major preservers are well established. We have gained an enviable reputation for our highly professional work which results in volume sales, and our integrity in dealing with our connections are above reproach.

We are certain that we can do an exceptional job, particularly in the case of your company because your reputation for good quality merchandise is well known, not only to us, but to the trade as well.

For the past several years we have sold your products in the Middle West which we obtained through our Eastern correspondents.

We have some people presently interested in your products and inasmuch as you are unable to quote us a delivered Chicago price, please quote us your price F.O.B. New York, Boston, or any other Eastern Port, duty paid.

We feel confident that our association will prove mutually beneficial and we anticipate the pleasure of hearing from you further.

Yours very truly,

HENRY BROCH & COMPANY.

cc.

KEY TO BRIEFS

- 1 PETITION FOR A WRIT OF CERTIORARI
- 2 BRIEF FOR RESPONDENT IN OPPOSITION
- 3 MOTION OF THE NATIONAL ASSOCIATION
OF RETAIL GROCERS OF THE UNITED
STATES FOR LEAVE TO FILE BRIEF AMICUS
CURIAE, AND BRIEF
- 4 BRIEF FOR THE FEDERAL TRADE COMMISSION
- 5 BRIEF FOR THE RESPONDENT
- 6 REPLY BRIEF FOR THE FEDERAL TRADE
COMMISSION
- 7 SUPPLEMENTAL BRIEF FOR THE RESPONDENT



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FILED

MAY 6 1959

JAMES R. BROWNING, Clerk

No. ~~100-100000~~ **61**

In the Supreme Court of the United States

OCTOBER TERM, 1958

FEDERAL TRADE COMMISSION, PETITIONER

v.

HENRY BROOK AND COMPANY

**PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

J. LEE RANKIN,

Solicitor General,

Department of Justice, Washington 25, D.C.

EARL W. KINTER,

General Counsel,

JAMES R. GURNEY,

Assistant General Counsel,

Federal Trade Commission, Washington 25, D.C.

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<i>Federal Trade Commission v. Pacific States Trade Association</i> , 273 U.S. 52	10
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Statutes:

Clayton Act, 38 Stat. 730, as amended, 49 Stat. 1526, 15 U.S.C. 13:	
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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. —

FEDERAL TRADE COMMISSION, PETITIONER

v.

HENRY BROCH AND COMPANY

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

The Solicitor General, on behalf of the Federal Trade Commission, prays that a writ of certiorari issue to review the judgment entered in the above case on December 11, 1958, by the United States Court of Appeals for the Seventh Circuit, setting aside a Commission order.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, pp. 13-21) is reported at 261 F. 2d 725.

JURISDICTION

The judgment of the Court of Appeals (Appendix B, *infra*, pp. 22-23) was entered on December 11, 1958. The time for filing a petition for writ of certiorari was extended, by order of Mr. Justice Clark on March 2, 1959, to May 9, 1959 (Appendix C, *infra*,

p. 24). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

brokerage commission to a buyer.

1. Whether Section 2(c) of the Clayton Act, which makes it unlawful for "any person" to pay or grant brokerage, or any allowance in lieu thereof, to the other party to a purchase or sale transaction, applies to a seller's broker who pays or grants part of his ~~brokerage, or any allowance in lieu thereof, to the~~

2. Whether, within the meaning of Section 2(c), a seller's broker pays part of his commission, or an allowance in lieu thereof, to a buyer when the broker's principal sells to a buyer at a reduced price which the seller had granted, as the broker knew, because of the broker's agreement to accept a reduced brokerage commission on sales to the favored buyer.

STATUTE INVOLVED

Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13, provides:

That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the

direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

STATEMENT

The Federal Trade Commission in its complaint (J.A. 1-5¹) charged that respondent Henry Broch and Company, a partnership, while engaged in commerce as a broker or sales agent for seller principals, violated Section 2(c) by granting and allowing a portion of its brokerage fee to one large buyer in connection with that buyer's purchase of a food product (apple concentrate) in commerce from a particular seller principal.

Broch, in its answer (J.A. 5-11), admitted that it was engaged in commerce as a broker or sales representative of seller principals; that the then current price of the commodity involved in the sale cited by the complaint was \$1.30 per gallon; that this price was reduced to \$1.25 by the seller in the instance cited; and that instead of being reimbursed by the seller at the previously agreed upon rate of 5%, it accepted a 3% brokerage payment on that sale. All other allegations of the complaint were denied.

After full administrative proceedings, the Commission held that Broch had violated Section 2(c) as charged and entered a cease and desist order (J.A. 195-197).

The facts are not in dispute. Broch was engaged by its seller principal under an agreement to sell apple concentrate at a 5% rate of brokerage commission (Appendix A, *infra*, pp. 14, 15). Broch sub-

¹ "J.A." refers to joint appendix in the Court of Appeals.

sequently agreed with its seller principal to accept only 3% brokerage on sales to a particular large purchaser in order that that purchaser might receive a price lower than that afforded any other (Appendix A, *infra* pp. 14, 17). The full established price was maintained on sales to all other customers, whether made through Broch or other brokers, and on all other sales Broch and all other brokers received their full agreed-to brokerage (J.A. 180-181). It was only on sales to the one favored customer, made through Broch, that the selling price and brokerage were reduced (J.A. 181).

The Commission found that Broch accepted a reduced brokerage "with full knowledge of the fact that their contribution would redound to the benefit of the buyer in the form of a price concession" (J.A. 190) and that within "the matrix of the factual situation projected by the record" this "constitutes a payment of part of their commission to the buyer exactly as though [Broch] had paid two per cent of their commission to the buyer direct" (J.A. 203).² Accordingly, the Commission held that Broch "granted and allowed, and are now granting and allowing, directly or indirectly, a portion of the commission or brokerage fee to which they are entitled from their seller principal * * * to * * * a buyer of food products in commerce, in connection with such buyer's purchase of food products in commerce" (J.A. 193).

² Arithmetic analysis reveals that Broch and the seller principal participated equally in the price concession granted the favored buyer. The sales to the favored buyer evidenced by the record amounted to \$40,736.80 (J.A. 176). The customary brokerage fee of 5% to Broch on these sales would have been \$2,036.84. The actual brokerage of 3% received by Broch on

The Court of Appeals for the Seventh Circuit set aside the Commission's order. Judge Schnackenberg's opinion for the court observed that the Commission's findings of fact were not questioned and that "our duty [is] to apply the law to the facts and to determine whether [the Commission's] process of legal reasoning when applied to the facts is correct" (Appendix A, *infra*, p. 14).

The court held that "Neither the language of § 2(c) nor its legislative history indicates that a seller's broker is covered by § 2(c)" (Appendix A, *infra*, p. 18). The court stated further that the Commission had "interested itself in a private grievance between rival brokers" and doubted "whether the public interest * * * can be said to be served by this proceeding against the seller's broker" (*id.*, *infra*, p. 19). The court said that while the Commission had relied upon its finding that Broch's acceptance of a reduced brokerage "constituted a payment of part of their commission to [the buyer], exactly as though Broch had paid 2% of their commission to the buyer direct," the facts merely showed that "because of Broch's agreement to reduce its commission, the seller was able to reduce its price", and the court concluded that Broch had not paid anything to the buyer either in substance or in fact (*id.*, *infra*, p. 20). The court also stated that the Commission's interpretation of § 2(c) would "promote price rigidity and uniformity

these sales amounted to \$1,222.11. The total reduction in brokerage \$2,036.84 minus \$1,222.11 then amounted to \$814.73 which is exactly 50% of the total price reduction of \$1,629.47 by the seller principal at \$.05 per gallon on the total sales.

contrary to the national antitrust policy," and that prohibiting a price reduction the basis of which was a lower commission payment to the seller's broker would mean that, so far as sales price is concerned, a seller's "costs are frozen without regard for the welfare of the public" (*ibid.*).

REASONS FOR GRANTING THE WRIT

1. This is the first court case directly involving the question of the accountability of a seller's broker under § 2(c) of the Clayton Act. The holding by the court below that § 2(c) does not cover sellers' brokers presents an important and substantial question of Federal law warranting resolution by this Court.

The decision is important not only as an interpretation of § 2(c) but also because it opens the door to price discriminations, particularly in the field of food distribution.³ The critical importance of the decision in the administration of the Act is shown by the fact that more than 90% of the Commission's complaints charging violation of § 2(c) involve the distribution of food and kindred products. The impact of the decision below upon the entire food distribution industry has already been recognized in the trade.⁴

The decision, by insulating sellers' brokers from accountability for their agreements with their principals to manipulate brokerage and to reflect such ma-

³ According to the 1954 Census of Business, Vol. 3, pp. 1-9, in the grocery industry (food and kindred products) the volume of sales handled by agents and brokers was \$7,621,093,000.

⁴ See *Brock Case Opens Way For More Price Discriminations; Texas Food Merchant*, March 1959, at p. 10; also see *Food Field Reporter*, January 5, 1959, at p. 6.

nipulation in price to particular buyers, carves a large loophole in § 2(c). The objective of the Robinson-Patman Act, and of § 2(c) in particular, was to eliminate this type of preferential treatment. A mass buyer desiring an unwarranted price concession is solely interested in obtaining a preferential price and is not concerned with whether brokerage is passed on to him by the seller or by the seller's broker. The buyer's dealings may be solely with the broker, and he may not know that the lower price which he receives represents a passing on to him of part of the commission of the seller's broker. If the broker is not within the section, as the court below holds, the section would be, on such facts, entirely ineffectual.

2. § 2(c) makes it unlawful for "any person" to pay or grant brokerage to a buyer. This all-inclusive language does not permit an exception for seller's brokers. And the legislative history of the Robinson-Patman Act supports the view that the prohibition runs against all persons, including sellers' brokers. The Congressional intent was to eliminate preferential treatment of particular buyers, through the medium of payment of brokerage, by *any* person, giver or taker, whoever he might be.⁵

⁵ See the remarks of Senator Logan, chairman of the Senate subcommittee considering amendment of Section 2 of the Clayton Act (80 Cong. Rec. 3115):

"Mr. George: What I wanted to get perfectly clear, if I could, was whether the same prohibitions relate to both the giver and the taker of a rebate in any form.

"Mr. Logan: The prohibition is against its being done at

Both the Third and Fourth Circuits have held that § 2(c) imposes liability upon brokers who represent sellers and pay brokerage to buyers. In *The Great Atlantic & Pacific Tea Co. v. FTC*, 106 F. 2d 667, 674 (C.A. 3), certiorari denied 308 U.S. 625, the court said:

* * * The edge of the paragraph [§ 2(c)] cuts two ways, prohibiting the payment or receipt of commissions, discounts or brokerage to the adversary party by the other's agent. * * *

In *Oliver Bros., Inc. v. FTC*, 102 F. 2d 763, 770 (C.A. 4), the court said:

And even if it were true that Oliver rendered services to the sellers, we do not think that this would change the situation. *No one would contend that, without violating this section, a broker representing the seller could give his commissions to the buyer*; for in such case the action of the broker would be the action of his principal, the seller, and would amount to the allowance of commissions by the seller to the other party to the transaction in direct violation of the statutory provision. * * * [Emphasis supplied.]

all, and, of course, it would apply to the giver as well as to the taker, although there is no criminal penalty provided.

* * * * *

"Mr. George: I beg the Senator's pardon for interrupting his presentation. I had the impression that the bill did impose penalties on the giver of a rebate, and I wanted to know whether it imposed like prohibitions, or penalties or whatever the bill provides, on the taker.

"Mr. Logan: The bill prohibits the act, and that prohibition would extend to all who are affected by it."

Inasmuch as § 2(c) constitutes a correlative prohibition against the payment and receipt of brokerage (*Great Atlantic & Pacific Tea case, supra*), the court below erred in failing to recognize that the cases in which a buyer's agent or broker has been held in violation of § 2(c) for receiving brokerage from the seller constitute a precedent for holding a seller's broker liable for giving brokerage to the other party.*

3. The court below held that Broch had not violated § 2(c) because it had not paid any part of its commission, either directly or indirectly, to the buyer. The court, in so holding, made a finding as to the facts in direct conflict with the Commission's factual finding. The Commission adopted the hearing examiner's findings as to the facts (J.A. 205), and the latter found (*id.*, 191-192):

However, what is involved here is * * * a dropping of commission on sales to a single

* The court below, citing *FTC v. Klesner*, 280 U.S. 19, expressed doubt that the instant proceeding was in the public interest. The *Klesner* case was under the Federal Trade Commission Act, which authorizes the Commission to proceed against unfair methods of competition only if it appears to the Commission that a proceeding "would be to the interest of the public." But there is no such limitation on a proceeding under § 11 of the Clayton Act, 15 U.S.C. 21, to enforce § 2(c) of the Act. The distinction in this respect between a proceeding to enforce the Trade Commission Act and a proceeding to enforce § 2(c) of the Clayton Act is succinctly stated in *Webb-Crawford Co. v. FTC*, 109 F. 2d 268, 269 (C.A. 5), as follows: "The Congress considered the effect on commerce of the things named in subsection (c), and absolutely prohibited them. The Trade Commission is not to enter on any enquiry about their evil effect, nor whether a proceeding would be in the public interest. Its duty is to enforce the prohibition." Cf. *Klor's, Inc. v. Broadway-Hale Stores*, decided April 6, 1959, slip op. p. 4, note 4.

purchaser, combined with a reduction in price to that purchaser under circumstances where it is clear that the reduction in commission was a concomitant of, in fact was the quid pro quo for, the reduction in price. Respondents' acceptance of a lower commission, under such circumstances, is as much a payment of part of their commission to the purchaser as if respondents had directly paid 2 per cent of their commission to the purchaser.

The Commission in its opinion also said that the "only reasonable inference" to be drawn from the established facts is that drawn by the examiner, that Broch's acceptance of a reduced commission "constitutes a payment of part of their commission to the buyer exactly as though [Broch] had paid two per cent of their commission to the buyer direct" (*id.*, 203).

In a proceeding under § 11 of the Clayton Act, as in a proceeding under the Trade Commission Act, "The weight to be given to the facts and circumstances admitted, as well as the inferences reasonably to be drawn from them, is for the Commission." *FTC v. Pacific States Trade Association*, 273 U.S. 52, 63. In consequence, a reviewing court in passing upon the question of whether a finding has evidentiary support is not authorized to "make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences." *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 73.

While error by a court in encroaching upon the Commission's fact-finding function may present a question which ordinarily does not in itself merit review

by this Court, the error here is intertwined with the court's construction of the statute. It likened Broch's agreement to reduce his commission, in order that his principal should give a particular buyer a lower price, as standing on the same footing as an agreement, for the same purpose "by seller's employees, its landlord or its advertising agency, to reduce their salaries, rent or fees" (Appendix A, *infra*, p. 20). But this view ignores the fact that Congress, recognizing that brokers are intermediaries between buyers and sellers and that this relationship had served as a cloak for concealed preferences and discriminations, enacted in § 2(c) a specific prohibition against passing on brokerage commissions to a buyer.

Likewise, the court at least implied that a seller's cost saving, attributable to a reduction by his broker in the commission to be paid him on sales to the favored buyer, constitutes a defense to the § 2(c) prohibition. To this extent the decision is in conflict with the decision of the Court of Appeals for the Third Circuit holding that the cost saving defense granted as to price discrimination by a proviso to § 2(a) may not be read into § 2(c). *Great Atlantic & Pacific Tea Co. v. FTC*, 106 F. 2d 667, 676-677, certiorari denied 308 U.S. 625.

CONCLUSION

The decision below presents questions of large importance in the administration of Section 2(c) of the Clayton Act. The petition for a writ of certiorari should be granted.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

EARL W. KINTNER,
General Counsel,

JAMES E. CORKEY,
Assistant General Counsel,
Federal Trade Commission.

MAY 1959.

' In appearing herein as legal representative of the Commission, the Department of Justice intimates no views of its own as to the underlying policy considerations that may be involved.

APPENDIX A

In the United States Court of Appeals for the
Seventh Circuit

No. 12305 SEPTEMBER TERM, 1958 SEPTEMBER SESSION,
1958

HENRY BROCH AND COMPANY, A COPARTNERSHIP CON-
SISTING OF HENRY BROCH AND OSCAR ADLER,
PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

PETITION FOR REVIEW OF ORDER OF THE FEDERAL TRADE
COMMISSION

December 11, 1958

Before DUFFY, *Chief Judge*, and SCHNACKENBERG
and HASTINGS, *Circuit Judges*.

SCHNACKENBERG, *Circuit Judge*. Henry Broch and
Oscar Adler, copartners trading as Henry Broch &
Company, herein called petitioners or Broch, ask us
to review the action of the Federal Trade Commis-
sion and set aside its cease and desist order of De-
cember 10, 1957, issued pursuant to a complaint
charging petitioners with violation of § 2(c) of the
Clayton Act, as amended by the Robinson-Patman
Act.¹

The complaint charged, in substance, that peti-
tioners, while engaged in commerce as a broker or
sales agent for seller principals, violated § 2(c) by

¹ § 2(c), 49 Stat. 1527, 15 U.S.C.A. § 13(c).

granting and allowing a portion of their normal and customary brokerage fee to a particular buyer in connection with that buyer's purchase of food products in commerce from a particular seller.

In their answer petitioners admitted that they were engaged in commerce as a broker or sales representative of seller principals; that the then current price of the commodity involved in the sale cited by the complaint was 1.30 per gallon; that this price was reduced to 1.25 by the seller in the instance cited; and that, instead of being compensated by the seller at a previously agreed to rate of 5%, petitioners accepted a 3% brokerage payment on that sale. All other allegations of the complaint were denied.

Following hearings before an examiner and the filing of his initial decision, containing findings of fact, conclusion, and a cease and desist order, petitioners appealed to the Commission, which adopted the said findings, conclusion and order and entered the order now under attack.

In this court the examiner's findings of fact are not questioned.² The facts appearing therefrom are as follows:

Broch is a broker or sales representative for about 25 principals who sell food products, and negotiates an annual volume of sales approximately \$4,000,000 to \$5,000,000. Among these seller principals is Canada Foods, Ltd., (hereinafter referred to as Canada Foods) a Canadian processor of apple concentrate and similar products. Canada Foods was also represented in the United States by several other broker-

² We are here confronted with our duty to apply the law to the facts and to determine whether respondent's process of legal reasoning when applied to the facts is correct. *Standard Oil Co. v. Federal Trade Commission*, 233 F. 2d 649, 651, affirmed 355 U.S. 396; *Atalanta Trading Corp. v. Federal Trade Commission*, 258 F. 2d 365, 368.

age firms, including Tenser & Phipps, Poole & Company, and Cuylar. The sales involved in this case were made to the J. M. Smucker Company, Orville, Ohio (hereinafter referred to as Smucker), a manufacturer of apple butter and preserves.

During negotiations in April and May 1954, when petitioners agreed to act as broker for Canada Foods, their commission on sales was established at 5%. The brokers other than petitioners were appointed with the understanding that their rate of commission would be 4%. Petitioners received a higher rate of commission because they stocked merchandise in advance of sales.

On October 11, 1954, Canada Foods established its price on its 1954 pack of apple concentrate at \$1.30 per gallon in 50-gallon steel drums, and it authorized its various brokers, including petitioners, to negotiate sales at that price.

The first attempt to sell the 1954 pack of Canada Foods' apple concentrate to Smucker was made, not by petitioners, but by Phipps (of Tenser & Phipps) who contacted Smucker on or about October 1, 1954, several weeks before petitioners first contacted that buyer. Upon receiving the quotation on October 11, 1954, Phipps advised Smucker of the \$1.30 price set by Canada Foods.

At some time between October 15 and 18, 1954, Smucker told Phipps that it was interested in purchasing approximately 500 barrels of the concentrate, but at a price lower than \$1.30. This counter-proposal was transmitted to Canada Foods by Phipps on or about October 18, 1954, and was discussed in person with Canada Foods' manager on October 19, 1954. Canada Foods' manager told Phipps that \$1.30 was Canada Foods' best price and that if it were not for a subsidy on apples by the Canadian Government,

Canada Foods could not sell even at that low price. This decision of Canada Foods to hold to its established \$1.30 price on the Smucker offer was immediately transmitted by Phipps to Smucker. On October 20, 1954, Phipps attempted to secure a 10-day option from Canada Foods for Smucker on 500 to 700 barrels of apple concentrate at the \$1.30 price. Canada Foods replied by letter of October 25, 1954, refusing even to hold the \$1.30 price for the period requested since, in its estimation, the price was liable to rise.

As late as October 26, 1954, Smucker specifically offered to purchase through Phipps 500 gallons of Canada Foods' concentrate at \$1.25. Phipps wired the offer to Canada Foods that same day. On October 27, 1954, Canada Foods' manager telephoned Phipps, again stating that his lowest price was \$1.30, and that the only way that the price could be lower would be if the brokerage was cut. Phipps relayed the information to Smucker, explaining that the order at \$1.25 could not be confirmed since Phipps was afraid that this would constitute a violation of the Robinson-Patman Act.

A day or two before this last related event of October 27, 1954, Broch contacted Smucker in an effort to sell apple concentrate on behalf of Canada Foods. Smucker told Broch that it already had an offer from Canada Foods for \$1.30 but that it would be interested in buying 500 drums at a lower price. With knowledge that Canada Foods, through another broker, was already negotiating to sell Smucker approximately 500 drums of concentrate and was holding to its \$1.30 price, Broch called Canada Foods and stated it could make the sale if the price were \$1.25 per gallon. Canada Foods took the proposition under advisement. On the following day, October 27, 1954,

the day Canada Foods told Phipps that the price could be reduced below \$1.30 only if brokerage were cut, Canada Foods telephoned Broch and advised that it would make the sale at \$1.25 per gallon provided Broch would agree to reduce its commission from 5% to 3%. Broch agreed and advised Smucker that Canada Foods would sell to it at \$1.25 per gallon. The sale of 500 steel drums of apple concentrate at \$1.25 per gallon was consummated, delivery made, and Broch received 3% brokerage rather than the usual 5%.

The order contained in the examiner's initial decision and adopted by respondent required Broch to cease and desist from "paying * * * Smucker, * * * any allowance or discount in lieu of brokerage * * * by selling * * * to such buyer at prices reflecting a reduction * * *, where * * * accompanied by a reduction in the regular rate of commission, brokerage * * * being paid to [petitioners] by such seller principal for brokerage service; * * *."

The examiner's conclusion, which was adopted by the Commission, is that petitioners "granted and allowed, and are now granting and allowing, directly or indirectly, a portion of the commission or brokerage fee to which they are entitled from their seller principal, Canada Foods * * * to * * * Smucker * * *, a buyer of food products in commerce, in connection with such buyer's purchase of food products in commerce."

Before this court, counsel for respondent has specified the following language from §2(c)³ as the basis for the order now being reviewed:

³ 15 U.S.C.A. § 13 (c), which reads:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof,

That it shall be unlawful for any person engaged in commerce, * * * to pay or grant * * * anything of value as a commission, brokerage, * * * or any allowance or discount in lieu thereof, * * * either to [or from] the other party to such transaction * * *.

In so specifying, respondent's counsel stated that he was interpolating the words "or from" following the word "to" in the phrase "to the other party." Of course, we do not concede that counsel has a right to add words that Congress failed to use.

The order of December 10, 1957 cannot stand.

Neither the language of § (2)(c) nor its legislative history indicates that a seller's broker is covered by § 2(c). Accordingly we hold that petitioner, as seller's broker, did not violate § 2(c). In arriving at this result, we have carefully considered *Oliver Bros., Inc. v. Federal Trade Commission*, 102 F. 2d 763, *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F. 2d 667, and *Quality Bakers of America v. Federal Trade Commission*, 114 F. 2d 393, principally relied on by respondent. Each of these cases involved buyers' purchasing agents who were charged with receiving brokerage commissions from the sellers, which they passed on to the buyers. This fact is emphasized in the *Great A. & P.* case, at 674, where the court said:

except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

* 80 Cong. Rec. 6281-82 (1936). See also 80 Cong. Rec. 3114, 7759-60 (1936); and Hearings Before the House of Representatives Judiciary Committee on Bills to Amend the Clayton Act, 74th Cong., 1st Sess. 37, 218, 258 (1935).

* * * The question presented for our consideration is simply whether or not the vendee may be compensated for services rendered by the vendee's agent acting as agent for the vendors. * * *

In the case before us, no agent of the buyer is involved. Petitioner is an agent solely of the seller.

Respondent did not proceed against the buyer or the seller. Instead it interested itself in a private grievance between rival brokers, Tenser & Phipps and Broch. We doubt whether the public interest, which is involved in the Act, can be said to have been served by this proceeding against the seller's broker.

In *Federal Trade Comm. v. Klesner*, 280 U.S. 19, 28, the court said:

* * * But the mere fact that it is to the interest of the community that private rights shall be respected is not enough to support a finding of public interest. To justify filing a complaint the public interest must be specific and substantial. Often it is so, because the unfair method employed threatens the existence of present or potential competition. * * *

The effect of respondent's order is that the commissions of a seller's broker are rendered immune from reduction by the seller when it is negotiating for the sale of its food products, and hence such a reduction, when used as a basis for quotation of a lower price, is illegal. This would be true even though the buyer does not suggest or even know of the reduction in the seller's brokerage commission, as in the case at bar.⁵

⁵ This was established by the testimony of purchasing agent Kiefer of Smucker.

Respondent relies heavily upon respondent's adoption of a finding by the examiner that the only reasonable inference possible is that Broch's acceptance of a reduced brokerage constituted a payment of part of their commission to Smucker, exactly as though Broch had paid 2% "of their commission to the buyer direct." However, even if the seller were enabled to reduce its price to Smucker, on an extraordinarily large order, because of an agreement by seller's employees, its landlord or its advertising agency, to reduce their salaries, rent or fees, it would not be the equivalent of a "direct" payment by the employees, the landlord or the advertising agency, to Smucker, the buyer. The most that can be said is that, because of Broch's agreement to reduce its commission, the seller was able to reduce its price. Neither in substance nor in fact, directly or indirectly, did Broch pay anything to Smucker.

Respondent's interpretation of § 2(c) would actually promote price rigidity and uniformity contrary to the national antitrust policy. In *Federal Trade Commission v. Reed*, 243 F. 2d 308, cert. denied, 355 U.S. 823, we said, at 309:

* * * the history, purpose and decisional law concerning the Clayton and Federal Trade Commission Acts demonstrates that they are in *pari materia*—to be read and construed as one in such manner as to best effectuate the purpose of Congress in enacting them. * * *

Obviously an important element in the cost of food distribution is the commission paid by sellers to their brokers. If a seller is to be forbidden to meet competition by reducing an item in its cost of distribution, then to that extent his costs are frozen without regard for the welfare of the public which must ultimately

defray the resultant costs of distribution.* Trade restraints in the distribution of groceries surely do not occupy a preferred antitrust position, as distinguished from comparable situations. *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231, 248-250 (1951), 233 F. 2d 649 (7th Cir. 1956), aff'd, 355 U.S. 396 (1958).

For the foregoing reasons, the order of the Federal Trade Commission entered December 10, 1957, is set aside.

ORDER SET ASIDE.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the
Seventh Circuit.

* Cf. *Simplicity Pattern Co. v. Federal Trade Commission*, 258 F. 2d 673, 683. Cert. granted Nov. 24, 1958, — U.S. —.

APPENDIX B

United States Court of Appeals for the Seventh
Circuit

No. 12305

Thursday, December 11, 1958

HENRY BROCH & COMPANY, ETC., ET AL., PETITIONERS
v.

FEDERAL TRADE COMMISSION, RESPONDENT

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL TRADE
COMMISSION

Before Hon. F. BRYAN DUFFY, *Chief Judge*; Hon.
ELMER J. SCHNACKENBERG, *Circuit Judge*; Hon. JOHN
S. HASTINGS, *Circuit Judge*.

This cause came on to be heard on the petition for
review of an order of the Federal Trade Commis-
sion, and the record from the Federal Trade Com-
mission, and was argued by counsel.

On consideration whereof, it is ordered and ad-
judged by this Court that the order entered in this
cause by the Federal Trade Commission on December
10, 1957 be, and the same is hereby, set aside, in
accordance with the opinion of this Court filed this
day.

United States Court of Appeals for the Seventh
Circuit

I, KENNETH J. CARRICK, Clerk of the United States
Court of Appeals for the Seventh Circuit, do hereby

certify that the foregoing ---- pages contain a true copy of JOINT APPENDIX FILED AUGUST 4, 1959; OPINION FILED DECEMBER 11, 1958; JUDGMENT ENTERED DECEMBER 11, 1958, in

CAUSE No. 12305

HENRY BROCH & COMPANY, A COPARTNERSHIP CONSISTING OF HENRY BROCH AND OSCAR ADLER

v.

FEDERAL TRADE COMMISSION

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

IN TESTIMONY WHEREOF I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this fifteenth day of April A.D. 1959.

KENNETH J. CARRICK,

*Clerk of the United States Court of Appeals
for the Seventh Circuit.*

APPENDIX C

Supreme Court of the United States

No. —, OCTOBER TERM, 1958

FEDERAL TRADE COMMISSION, PETITIONER

v.

HENRY BROCH AND COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF
CERTIORARI

UPON CONSIDERATION of the application of counsel
for petitioner,

IT IS ORDERED that the time for filing petition for
writ of certiorari in the above-entitled cause be, and
the same is hereby, extended to and including May
9th, 1959.

/s/ TOM C. CLARK,
*Associate Justice of the Supreme
Court of the United States.*

Dated this 2 day of March 1959.

(24)



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SUPREME COURT, U. S.

Office of the Clerk, U.S.

FILED

JUN 9 1959

JAMES R. BROWNING, Clerk

No. 61

IN THE
Supreme Court of the United States

OCTOBER TERM, 1959

FEDERAL TRADE COMMISSION, *Petitioner*

vs.

HENRY BROCH & COMPANY, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

**FREDERICK M. ROWE,
JOSEPH DUCOEUR,**

of

**KIRKLAND, ELLIS, HODSON,
CHAFFETZ & MASTERS
800 World Center Building,
Washington 6, D. C.**

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Chicago 3, Illinois**

Attorneys for Respondent.

June 9, 1959.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1958

No. 895

FEDERAL TRADE COMMISSION, *Petitioner*

vs.

HENRY BROCH & COMPANY, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

In view of the Court of Appeals' premise that the Federal Trade Commission's application of the Robinson-Patman Act in this case "would actually promote price rigidity and uniformity contrary to the national antitrust policy" (Pet. 20), it is significant that the Commission's petition for certiorari does not carry the conventional imprimatur of the Antitrust Division or the Justice Department. Instead, the Solicitor General advises that "In appearing herein as legal representative of the Commission, the Department of Justice intimates no views of its own as to the underlying policy considerations that may be involved" (Pet. 12 n. 7).

Questions Presented

Section 2(c) of the Robinson-Patman Act prohibits the payment of brokerage commissions by any person to the "other party" or his intermediary. In this case, the Court of Appeals unanimously set aside a ruling by the Federal Trade Commission that respondent, an independent food broker, violated Section 2(c) by accepting a smaller rate of commission from his seller principal who reduced his price to one buyer for an economical quantity of apple concentrate in a competitive situation. The Court of Appeals declined to adopt the Commission's unprecedented interpretation, never before tendered to a court in two decades of Robinson-Patman enforcement, and held that "neither in substance nor in fact, directly or indirectly, did Broch pay anything to Smucker" (Pet. 20). The Court also declared that Section 2(c) did not cover an independent seller's broker, noting that respondent had functioned as "an agent solely of the seller" (Pet. 19).

Accordingly, the questions presented concern (1) the correctness of the Court of Appeals' holding under Section 2(c) that no payment of brokerage to the buyer was made by respondent's acceptance of a smaller commission from the seller;¹ and (2) the extent of statutory liability imposed by Section 2(c) on independent seller's brokers, in circumstances reflecting open price differentials governed expressly by the provisions of the Act as to discriminations in price.

¹ If the Court of Appeals' holding on this aspect is correct, the other question becomes academic. Question 1 of the Petition, simply presuming that such a "payment" was made (Pet. 2), begs the issue here while acknowledging its existence by designating it as Question 2 (Pet. 2).

Statute Involved

The pertinent provisions of the Clayton Act, as amended by the Robinson-Patman Act, are as follows—

Section 2(c), the so-called Brokerage Clause, declares:

“It shall be unlawful for any person * * * to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.” 15 U.S.C. § 13(c).

The pertinent text of Sections 2(a) and (b), prohibiting injurious and unjustified price discriminations by sellers, declares:

“It shall be unlawful for any person * * * to discriminate in price between different purchasers of commodities of like grade and quality * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing * * * shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such com-

modities are to such purchasers sold or delivered * * *. 15 U.S.C. § 13(a).

“ * * Provided, however, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.”* 15 U.S.C. § 13(b).

Section 2(f), defining the liability of the recipient of price discriminations, provides:

*“It shall be unlawful for any person * * * knowingly to induce or receive a discrimination in price which is prohibited by this section.”* 15 U.S.C. § 13(f).

Statement

This controversy originated in a contest between two rival brokers for a sale of apple concentrate to a food processor in Ohio, which culminated in a Federal Trade Commission proceeding against respondent who closed the deal which his competitor lost.

Respondent, a Chicago partnership functioning as an independent sales representative on behalf of about twenty-five sellers of food products, in early 1954 began to represent Canada Foods, a Nova Scotia apple producer, at an anticipated 5 per cent commission basis. Canada Foods also designated three other sales representatives in the United States, including Tenser & Phipps, a broker in Pittsburgh, Pennsylvania.

In early October of 1954, Canada Foods instructed respondent, as well as Tenser & Phipps, to sell the 1954 pack of apple concentrate at \$1.30 per gallon in

fifty-gallon steel drums (J.A. 104, 109).² In negotiations carried on independently both with respondent and Tenser & Phipps, the Smucker Company, a prospective buyer, bid only \$1.25 per gallon for 500 drums, an unusually large lot permitting savings in preparation, packaging and freight (J.A. 127-130), and suggested that similar concentrate was available at lower prices from competing sources (J.A. 31, 75-76, 132-135).

Respondent telephoned the details of the Smucker offer to the manager of Canada Foods, who said he would "sharpen my pencil, and let you know" (J.A. 76, 132-133). The next day Canada Foods' manager called back to accept the buyer's bid of \$1.25 per gallon, but informed respondent that "You are going to receive three per cent brokerage" (J.A. 77, 18-19, 133). As Canada Foods' manager viewed the sale, he gave respondent "permission to sell on these conditions" (J.A. 133). Respondent objected but "he cut me off pretty fast," and saw that nothing would be gained by protesting further except loss of the sale (J.A. 77). The arrangement was nevertheless profitable for respondent because its expenses in negotiating this unusually large order were much smaller than if 500 drums of apple concentrate were sold piecemeal in the usual quantities of 50 to 100 drums to many buyers (J.A. 77).

In the meantime, respondent's rival, Tenser & Phipps, had advised Smucker, the buyer, that "We could confirm the order at the price of \$1.25, but we are very much afraid that we would be right in the way of the Robinson-Patman Act and we might find

² References are to pages of the joint appendix in the Court of Appeals.

our names in print. It would be a feather in somebody's cap to decorate us with the violation * * * (J.A. 117-118).³

While instituting no action against either the seller or the buyer, the Commission on January 11, 1956 issued a complaint charging respondent with violating Section 2(c). Respondent's rival Phipps appeared as chief witness in support of the complaint. The hearings did not substantiate the complaint's allegations that respondent "requested" the seller to lower its established price to the buyer and "to recoup part of such loss" by reducing respondent's customary commission (J.A. 3).

Instead, the Commission's ruling deemed it sufficient that "by acquiescence, ratification, confirmation, agreement, or otherwise" respondent received a reduction in brokerage rather than lose this large sale (J.A. 203). The Commission theorized that in negotiating the sale to Smucker respondent made "a payment of part of their commission to the buyer" via respondent's acceptance of the smaller commission at the same time as the seller gave a lower price to the buyer—"exactly as though [respondent] had paid two per cent of their commission to the buyer direct" (J.A. 203).⁴ In reaching this interpretation of Section 2(c),

³ Phipps later explained about being "found out by any member of the National Brokerage Association that wanted to have a gripe" (J.A. 42).

⁴ The Commission's "[a]rithmetic analysis," said to reveal a 50-50 sharing of the price reduction (Pet. 4 n. 2), is sheer legerdemain. The FTC's own exhibit shows respondent's hypothetical "loss" as 2.75 cents a gallon, whereas the buyer secured a 5 cent price reduction (Com. Ex. 18—not printed). The complaint charged that the seller recouped "60 percent" of respondent's customary commission (J.A. 3); the Commission exhibit is down to 55%; and counsel now claim 50%. All are equally discredited by the Commission's failure to prove its charges in the complaint.

the Commission regarded it "unnecessary to resort to the reports of Congress to ascertain what was intended," for after "[r]eflection upon the climate which produced the Clayton Act" it concluded that "the matrix of the factual situation projected by the record" placed respondent in violation of Section 2(c) (J.A. 201, 203).

Commission counsel acknowledged below that Section 2(c) would not be a proper vehicle for pursuing a "price reduction openly made coincident with a reduction in the broker's commission," for "[i]f this case involved simply a price reduction it would have been a matter properly cognizable under 2(a)" (FTC Br. 16, 25). Notwithstanding the prohibitions of the Commission's order precisely on such price reductions,⁵ counsel urged that additional factors supported a conclusion that respondent did grant a payment to the buyer.

The Court of Appeals rejected the Commission's theory and unanimously reversed. In the Court's opinion, "[t]he most that can be said is that, because of Broch's agreement to reduce its commission, the seller was able to reduce its price. Neither in substance nor in fact, directly or indirectly, did Broch pay anything to Smucker" (Pet. 20).

In addition, the Court declared that "Neither the language of § 2(c) nor its legislative history indicates that a seller's broker is covered by § 2(c). Accordingly we hold that petitioner, as seller's broker, did

⁵ The Commission's order flatly prohibited respondent from selling to any buyer "at prices reflecting a reduction" from the seller's previous prices, "where such reduction in price is accompanied by a reduction in the [broker's] regular rate of commission" (J.A. 195).

not violate § 2(c)" (Pet. 18). In this connection, the Court stressed that respondent was "an agent solely of the seller," and not a buyer's dummy for funneling back illicit payments to his employer (Pet. 19).

The Court of Appeals also remarked that the Commission, rather than proceeding against the buyer or the seller under the applicable statutory provisions, had ignored the public interest by meddling with "a private grievance between rival brokers" (Pet. 19).

Above all, the Court feared that the Commission's unwarranted interpretation of Section 2(c) "would actually promote price rigidity and uniformity contrary to the national antitrust policy" (Pet. 20). For

"Obviously an important element in the cost of food distribution is the commission paid by sellers to their brokers. If a seller is to be forbidden to meet competition by reducing an item in its cost of distribution, then to that extent his costs are frozen without regard for the welfare of the public which must ultimately defray the resultant costs of distribution. Trade restraints in the distribution of groceries surely do not occupy a preferred antitrust position, as distinguished from comparable situations" (Pet. 20-21).

ARGUMENT

As will be detailed, the decision below properly parses Section 2(c), the so-called Brokerage Clause, in harmony with the design of the framers and this Court's admonitions to "reconcile [interpretations of the Robinson-Patman Act] with the broader anti-trust policies that have been laid down by Congress."⁶

⁶ *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61, 74 (1953).

The ruling below does not foster price discriminations, but rather requires the Commission to invoke the pertinent statutory remedies in Sections 2(a) and (f) against the grant or receipt of discriminatory prices, instead of resorting to Section 2(c) as an unauthorized shortcut permitting the exclusion of cost and competitive factors which can "justify" a price differential under the applicable provisions. Moreover, the opinion below concerns a petty mercantile grievance in a "sporting" case, and creates no pregnant legal doctrine or genuine conflict of decision meriting the dignity of Supreme Court review.

I. The Decision Below Accurately Interprets Section 2(c) in Light of the Congressional Design to Force Price Differentials Into the Open for Adjudication Under the Price Discrimination Provisions.

The Court of Appeals recognized and effectuated the Congressional plan to establish Section 2(c), the so-called Brokerage Clause, as an auxiliary to the central statutory prohibitions on the grant or receipt of price discriminations.

In the legislative design of the Clayton Act, before and after its amendment by the Robinson-Patman Act, the key prohibition outlaws price discriminations which are detrimental to competition and cannot be "justified" by cost or competitive considerations. To nip evasion of the main prohibition by devices to conceal discriminations in price, Congress enacted several auxiliary provisions. Thus, as explained by Senator Logan at the time of the Robinson-Patman amendments in 1936,

"In order to evade the provisions of the Clayton Act, however, it was found that while direct price

discrimination could not be indulged in, the buyer, if he were sufficiently powerful, could designate someone and say 'That is my broker.' Perhaps it was a clerk in his office. Perhaps it was a manager of a store. Perhaps it was a subsidiary corporation organized for the purpose. However, the buyer would say to the seller, 'You must sell through that man, and you must pay him a certain percentage or amount of brokerage'; and when the so-called broker or dummy broker received what was paid him, he turned it over to the buyer, and in that way a price discrimination was brought about." 80 Cong. Rec. 6281-82 (1936).

Accordingly, Section 2(c) was incorporated in the omnibus revision of the statute as a ban on the payment as well as the receipt of such "bogus" brokerage payments which disguised price discriminations to devious buyers. Its purpose was to "force price discriminations out into the open." *Biddle Purchasing Co. v. Federal Trade Commission*, 96 F. 2d 687, 692 (2d Cir. 1938), *cert. denied*, 305 U.S. 634 (1938). Confronted with an "absolute" proscription in Section 2(c), "sellers would be forced to confine their discriminatory practices to price differentials, where they could be more readily detected and where it would be much easier to make accurate comparisons with any alleged cost savings." *Federal Trade Commission v. Simplicity Pattern Co.*, No. 406, O.T. 1958, pp. 10, 13 (June 8, 1959).

Both the text and conception of Section 2(c) preclude the FTC's strained application which the Court of Appeals correctly rejected in the instant case. For here the seller's price reduction to the buyer was "open" and obvious from the face of the invoice, and

was directly amenable to the governing provisions of Sections 2(a) and (f) pertaining to alleged price discriminations, subject to "justification" by cost and competitive factors.⁷ The open price reduction at issue could thus hardly be deemed a payment of those "false brokerage allowances" or "secret" discriminations specified by the Court's *Simplicity Pattern* opinion (pp. 13 n. 12, 15) as "banned outright" under Section 2(c)—let alone be viewed *as a payment on the part of the broker* who acquiesced in a smaller commission when the seller openly lowered his price.

In this context, moreover, the Court of Appeals accurately held that Section 2(c) imposes no liabilities on an independent seller's broker. The statutory prohibition on brokerage payments by "any person" to the "other party" or his intermediary, read both literally and in the perspective of the Congressional purpose, refers to discriminatory concessions by a seller to buyers or the buyer's agents who act as conduits for receiving and concealing forbidden payments. As analyzed in the Report of the House Judiciary Committee, Section 2(c)'s ban on false brokerage payments "prohibits its allowance by the buyer direct to the seller, or by the seller direct to the buyer; and it prohibits its payment by either to an agent or intermediary acting in fact for or in behalf, or subject to

⁷ It was conceded that respondent "introduced evidence that the reduction in price responded to cost savings or to meet competition" (FTC Brief before Court of Appeals, p. 25 n. 13). This showing was held immaterial to a Section 2(c) charge by the Commission (J.A. 204), which failed to recognize that the open price differential here was properly cognizable under Sections 2(a) and (f).

the direct or indirect control, of the other.”⁸ Indeed, the phrase “any person,” which throughout the Robinson-Patman Act refers only to seller and buyer parties in commercial transactions, is still further qualified in Section 2(c) by the specification of “other” parties⁹—thereby highlighting the absence of any purpose to penalize the independent seller’s broker who inherently cannot function as a “party” to the sale.

In sum, the decision of the Court of Appeals implements and respects the statutory text and purpose. While the interpretations of Section 2(c) in the two decades of the Robinson-Patman Act have consistently carried out the legislative purpose to expose “secret” or concealed payments by one party to the other, whether directly to the buyer¹⁰ or indirectly to his agent or dummy,¹¹ not a single judicial decision to date

⁸ H.R. Rep. 2287, 74th Cong., 2d Sess. 15 (1936). In Senator Logan’s words, Section 2(c) meant that “no buyer shall engage in this trick brokerage practice whereby a rebate may be made by the seller.” 80 Cong. Rec. 6282 (1936). Nothing more than equal liability for both grantor and recipient of a forbidden brokerage payment *as specified in the statute* is suggested in the Logan-George colloquy quoted by the Commission (Pet. 7 n. 5).

⁹ Thus, the term “person” rather than a more descriptive noun introduces Sections 2(a), 2(e), and 2(f) as well, and in each instance refers only to the buying and selling parties in a commercial transaction. Contrariwise, when Congress wished to extend liability beyond the immediate buyer-seller parties, it utilized more embracing terminology. For example, Section 3, the criminal provision of the Robinson-Patman Act, reaches any “person” who is “a party to” or may “assist in” an illegal transaction. 15 U.S.C. § 13a.

¹⁰ *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F. 2d 667 (3d Cir. 1939), *cert. denied*, 308 U.S. 625 (1940).

¹¹ *E.g., Independent Grocers Alliance Distributing Co. v. Federal Trade Commission*, 203 F. 2d 941 (7th Cir. 1953); *Southgate Brokerage Co. v. Federal Trade Commission*, 150 F. 2d 607 (4th Cir. 1945), *cert. denied*, 326 U.S. 774 (1945); *Modern Marketing Service, Inc. v. Federal Trade Commission*, 149 F. 2d 970 (7th Cir. 1945).

sanctions the Commission's upside-down theory of inflicting liability on the broker representing the seller who openly quotes a lower price.¹²

II. *The Decision Below Fosters No Price Discriminations, But Rather Reconciles the Robinson-Patman Act With Overall Antitrust Policies.*

The decision of the Court of Appeals provides no sanctuary for price discriminations, but rather achieves an essential reconciliation of Section 2(c) with antitrust objectives.

The plain provisions of the Robinson-Patman Act foreclose the Commission's undocumented assertion that the decision below "opens the door to price discriminations" (Pet. 6).¹³ The ruling at bar confines itself to Section 2(c), the so-called Brokerage Clause, and does not touch Sections 2(a) and (f), the prime weapons in the Commission's arsenal to combat illicit price discrimination. To be sure, those provisions preserve some pricing flexibility for a competitive economy by permitting the "justification" of price differentials by reference to cost economies or the meeting of competition—factors which the respondent tendered but the Commission swept from consideration

¹² The Commission's ruling significantly shunned the legislative reports, and instead felt that the "climate which produced" the Robinson-Patman Act made the obscure text of Section 2(c) "so clear that it is unnecessary to resort to the reports of Congress to ascertain what was intended" (J.A. 201). Actually, the House Report expressed a specific concern to protect independent seller's brokers, for "the broker so employed discharges a sound economic function and is entitled to appropriate compensation by the one in whose interest he so serves." H.R. Rep. No. 2287, 74th Cong., 2d Sess. 15 (1936).

¹³ The Commission's professed fears are bare of substantiation by legal analysis or citations, and rely on such authorities as the *Texas Food Merchant* and the *Food Field Reporter* (Pet. 6 n. 4).

here (J.A. 204). But the availability of legal justifications guaranteed by statute in price discrimination cases provides no warrant for a strained resort to a more seductive but inapplicable provision which simplifies the prosecution's case and cuts off the rights of the respondent.¹⁴

Instead, the decision below wisely averts collision between the Robinson-Patman Act and antitrust policy. Under the Commission's instant application of Section 2(c), which demands no proof of competitive effects and permits none of the statutory justifications, a violation occurs whenever goods are sold "at prices reflecting a reduction from [current] prices" "where such reduction in price is accompanied by a reduction in the [broker's] regular rate of commission" (J.A. 195). The inevitable tendency of such a doctrine is to chill price bargaining and freeze brokerage commissions at artificially high levels.¹⁵ And

¹⁴ As trenchantly observed by the former Chief Economist of the FTC, "The predominance of brokerage cases is probably due partly to the zeal of the National Association of Food Brokers in bringing violations of this section of the act to the commission's attention and partly to the comparative simplicity of a proceeding under this section of the statute. Since violation consists merely in payment of brokerage or an equivalent to a party on the other side of the transaction or to his representative, the commission need only prove a relatively simple fact in order to establish its case. There is no need to consider competitive injury, cost justification, or action in good faith to meet the equally low price of a competitor." Edwards, *Twenty Years of the Robinson-Patman Act*, 29 J. Bus. U. of Chi. 149, 151-152 (1956). Indeed, respondent's rival Phipps in identifying the "feather in somebody's cap" talked about being "found out by any member of the National Brokerage Association that wanted to have a gripe" (J.A. 42).

¹⁵ Perhaps this animates the "zeal of the National Association of Food Brokers" discussed by Dr. Edwards. That organization was recently enjoined from restrictive practices aborting competition among its members. *National Food Brokers' Ass'n*, F. T. C. Dkt. No. 6363 (1955).

when an important element in the cost of food distribution is immunized from the pressures of competition, the consumer's food bill in the end must pay the freight. Indeed, comparable efforts to "stabilize" brokerage commissions in other areas of the economy have been rigorously pursued as illegal restraints of trade under the Sherman Act¹⁶—as doubtless perceived by the Antitrust Division of the Department of Justice when it did not endorse the Federal Trade Commission's petition for certiorari.

By preventing such an enforcement anomaly, the Court of Appeals faithfully implemented this Court's mandate to "reconcile [interpretations of the Robinson-Patman Act] with the broader antitrust policies that have been laid down by Congress." *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61, 74 (1953). There this Court denounced a strained interpretation of Section 2(f) which could "give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation," and refused to construe the Act's "ambiguous language as putting the buyer at his peril whenever he engages in price bargaining." *Id.* at 63, 73. This Court stressed that "[t]ime and again there was recognition in Congress of a freedom to adopt and pass on to buyers the benefits of more economical processes." *Id.* at 72 n. 11.

Here the Court of Appeals declined to sanction an application of Section 2(c) which "would actually

¹⁶ *E.g.*, *United States v. National Association of Real Estate Boards*, 339 U.S. 485 (1950); *United States v. American Association of Advertising Agencies*, 1956 CCH Trade Cases, par. 68,252 (S.D.N.Y. 1956); cf. *Sugar Institute v. United States*, 297 U.S. 553, 587-88 (1936).

promote price rigidity and uniformity contrary to the national antitrust policy" (Pet. 20). For as the Court recognized, "[i]f a seller is to be forbidden to meet competition by reducing an item in its cost of distribution, then to that extent his costs are frozen without regard for the welfare of the public which must ultimately defray the resultant costs of distribution. Trade restraints in the distribution of groceries surely do not occupy a preferred antitrust position, (as distinguished from comparable situations" (Pet. 20;21).

III. *The Decision Below Concerns a "Sporting" Case Devoid of Public Significance or Doctrinal Conflict.*

As pointed out by the Court of Appeals, this case was conceived in a petty mercantile grievance and reflects an essentially private rather than public controversy. The record belabors a haggle of de minimis dimensions, and is redolent with the personal pique of Mr. Phipps who muffed the apple concentrate deal which respondent closed. In effect, the Commission's processes here advanced a commercial vendetta rather than the public interest in a competitive economy and lower prices.¹⁷

¹⁷ There is no merit to the Commission's intimation (Pet. 9 n. 6) that the "public interest" is not a relevant factor in Robinson-Patman cases, for numerous discrimination proceedings have been dismissed by the FTC itself for lack of "public interest" in their prosecution. *E.g.*, *Bohn Aluminum & Brass Corp.*, F. T. C. Dkt. No. 5720 (1955); *Argus Cameras, Inc.*, 51 F. T. C. 405, 409 (1954); *B. F. Goodrich Co.*, 50 F. T. C. 622, 623 (1954); *Wildroot Co.*, 49 F. T. C. 1578, 1581-82 (1953).

Furthermore, the refusal of the Court of Appeals to accept the FTC's odd twist of Section 2(c), never before tendered to a court in two decades of Robinson-Patman enforcement, merely contains the Commission within conventional and long-established boundaries for coping with alleged price discriminations. Only the antitrust paradox of the Commission's abortive theory retrieves this case from oblivion.

Nor is there any conflict of decision deserving resolution by this Court. The Commission's statement that two circuits "have held that § 2(c) imposes liability" upon independent seller's brokers (Pet. 8) is not only specious, but is belied by the Commission's simultaneous claim that "[t]his is the first court case directly involving the question of the accountability of the seller's broker under § 2(c) of the Clayton Act" (Pet. 6). Equally baseless is the further suggestion of conflict in the assertion that the court below "at least implied" the availability of statutory cost justification in a Section 2(c) proceeding (Pet. 11). This alleged implication, nowhere referenced to the text of the opinion below, defies detection in the words used by the Court of Appeals. The Supreme Court traditionally sits to review conflicting decisions, not unidentified and unidentifiable "implications."

CONCLUSION

The unanimous decision below correctly parses the perplexing text of the Robinson-Patman Act and fosters competitive pricing in harmony with the antitrust laws. At the core of this case is a petty brokers' bicker which generates no significant public controversy deserving of Supreme Court review. Accord-

ingly, it is respectfully submitted that the Petition
for a Writ of Certiorari should be denied.

Respectfully submitted,

FREDERICK M. ROWE,
JOSEPH DUCOEUR,

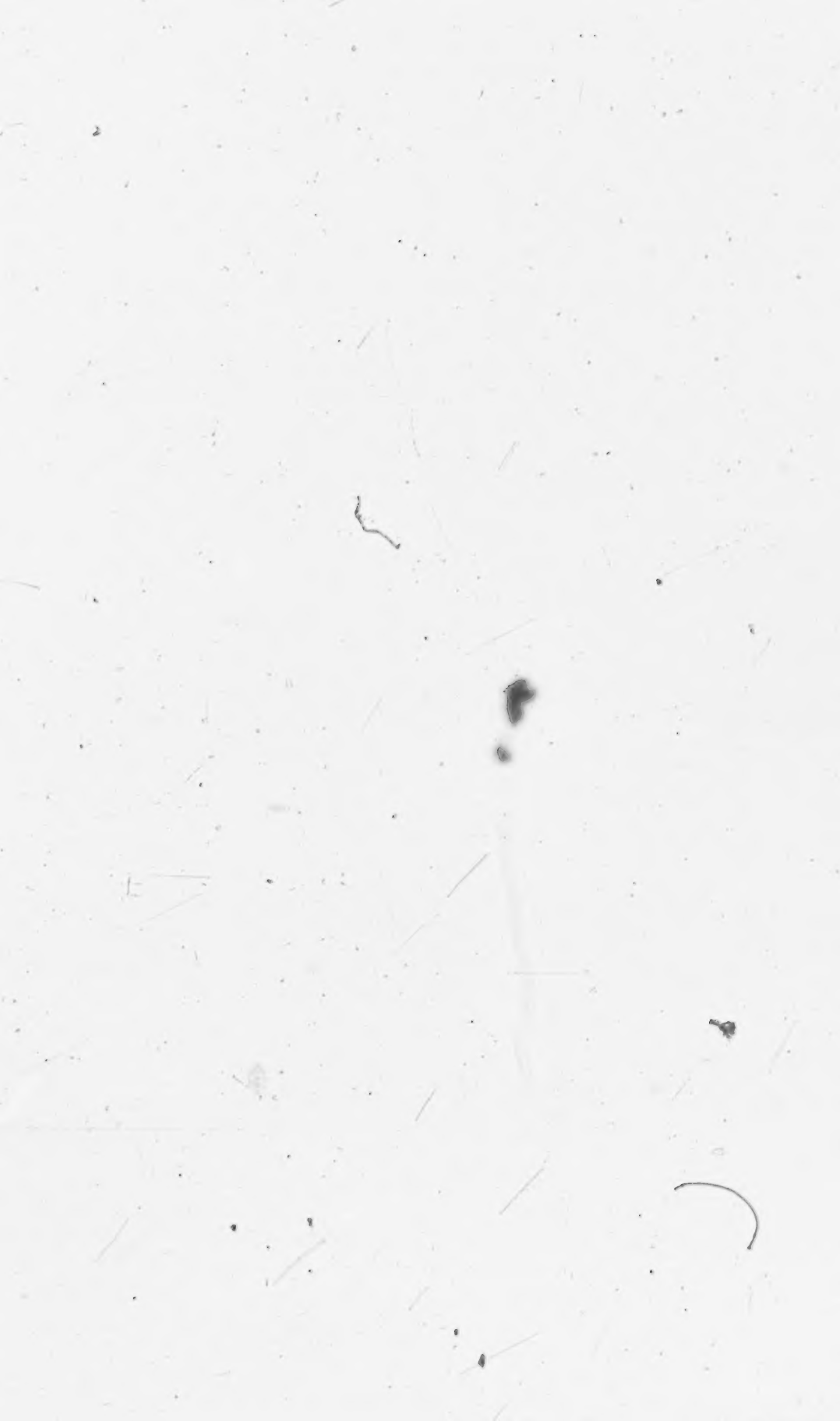
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June 9, 1959.



3

MOTION FILED SEP 30 1959

IN THE
Supreme Court of the United States
OCTOBER TERM, 1959

No. 61

FEDERAL TRADE COMMISSION, *Petitioner*,
v.
HENRY BROCH AND COMPANY, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals
for the Seventh Circuit

**MOTION OF THE NATIONAL ASSOCIATION OF
RETAIL GROCERS OF THE UNITED STATES
FOR LEAVE TO FILE BRIEF AMICUS CURIAE,
AND BRIEF**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1959

No. 61

FEDERAL TRADE COMMISSION, *Petitioner,*

v. ✓

HENRY BROCH AND COMPANY, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals
for the Seventh Circuit

**MOTION OF THE NATIONAL ASSOCIATION OF
RETAIL GROCERS OF THE UNITED STATES
FOR LEAVE TO FILE BRIEF AMICUS CURIAE**

The above association, pursuant to Rule 42 of the Rules of this Court, respectfully moves for leave to file the brief *amicus curiae* annexed hereto. Consent to the filing of a brief has been refused by the respondent.

Movant is a non-profit membership trade association, founded in Chicago, Illinois in 1893, and incorporated on October 9, 1916 under the law of the District of Columbia, with its principal office and place of business located at 360 North Michigan Avenue, Chicago, Illinois.

It is a federation of over 300 state and local associations of food retailers, and has approximately 40,000 members, including super market operators. Some 47 per cent of its member retailers live in towns with less than 25,000 population. About 25 per cent live in cities over 250,000 population. Members buy their merchandise through every available

means. Forty-one per cent are affiliated with co-operative buying organizations. Those affiliated with voluntary buying groups sponsored by wholesalers represent 39 per cent. The remaining 20 per cent have no affiliation with buying groups. The average annual sales volume per member store is approximately \$329,000.

Diversion of brokerage to favored large buyers places independent retailers at a substantial competitive disadvantage. It was the practice of large food distributors to use their mass purchasing power to coerce diversion of brokerage to themselves which led to the enactment of Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act. That power has increased substantially in the last decade.

The decision below removing food brokers like respondent herein from the prohibition of Section 2(c) will have the practical effect of permitting the return of diversion of brokerage to large favored distributors placing independent distributors at a substantial competitive disadvantage and weakening the competitive system in food distribution.

Since independent retailers are the primary victims of such discrimination, movant has knowledge of, and experience with, the practical effects of the decision below. Movant believes the parties to this cause will not adequately present such facts, and offers the annexed brief to contribute to the Court's consideration of the issue on this appeal.

Respectfully submitted,

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September 30, 1959

IN THE
Supreme Court of the United States

OCTOBER TERM, 1959

No. 61

FEDERAL TRADE COMMISSION, *Petitioner*,

v.

HENRY BROCH AND COMPANY, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals
for the Seventh Circuit

**BRIEF OF THE NATIONAL ASSOCIATION OF RE-
TAIL GROCERS OF THE UNITED STATES, AS
AMICUS CURIAE**

ARGUMENT

**IN PRACTICAL EFFECT THE DECISION BELOW OPENS THE
WAY FOR LARGE FOOD DISTRIBUTORS EMPLOYING THEIR
ENORMOUS PURCHASING POWER TO EXACT DISCRIMINA-
TORY CONCESSIONS FROM SUPPLIERS**

The lengthy chain-store investigation conducted in the 1930's by the Federal Trade Commission disclosed that one of the most prevalent modes of oppressive discriminations in food distribution was the diversion of brokerage to favored buyers.

In its final report of the chain-store investigation, filed with Congress in 1934, the Federal Trade Commission stated:

“There were interviews with 129 manufacturers in the grocery group, 76 of which admitted that preferential treatment in some form was given. Thirty-three of the manufacturers interviewed stated positively that threats and coercion had been used by chain store companies to obtain preferential treatment. * * *

“In 23 of the 33 instances, threats and coercive measures were employed and resulted in securing the concession demanded. * * *

“Of the 23 instances in which manufacturers in this group stated they acceded to the demands of chains, 15 were demands for brokerage, 1 for freight allowance, 2 for lower prices and 5 were for other concessions. Those who granted brokerage, because of demands therefore, stated they acceded in order to obtain business.”¹

The Senate and House Judiciary Committee reports on the Robinson-Patman Bill called attention to the matter in these words:

“Among the prevalent modes of discrimination at which this bill is directed is the practice of certain large buyers to demand the allowance of brokerage direct to them upon their purchases, or its payment to an employee, agent, or corporate subsidiary whom they set up in the guise of a broker, and through whom they demand that sales to them be made.”²

Accordingly, in Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act,³ Congress pro-

¹ Final Report of the Chain-Store Investigation S. Doc. No. 4, 74th Cong. 1st Sess. 24-25 (1934).

² S. Rep. No. 1502, 74th Cong. 2d Sess. 7 (1936); H. Rep. No. 2287, 74th Cong. 2d Sess. 15 (1936). See also Hearings Before Subcommittee of the Committee On the Judiciary on S. 4171, 74th Cong. 2d Sess. (1936), and Hearings Before Committee on The Judiciary on H. R. 8442; H. R. 4995, H. R. 5062, 74th Cong. 1st Sess. (1935).

³ 49 Stat. 1526 (1936), 15 U.S.C. 13 (1958).

hibited any diversion of any kind of any sales compensation by any person to any buyer or any representative of any buyer. However, the Committee Report emphasized that the seller has the choice of using its own selling department (i.e. employee salesmen), or independent brokers, to do its selling and to pay them sales compensation for their services. Thus:

“ * * * Which method is chosen depends presumptively upon which is found more economical in the particular case; but *whichever method is chosen, its cost is the necessary and natural cost of a business function which cannot be escaped.* It is for this reason that, when free of the coercive influence of mass buying power, discounts in lieu of brokerage are not usually accorded to buyers who deal with the seller direct since *such sales must bear instead their appropriate share of the seller's own selling cost.*”⁴ (Italics added).

Diversion of brokerage to a few large buyers simply means that independent food retailers who are thereby discriminated against, bear most, if not all, of the seller's selling cost, the sales to large favored buyers bearing little or none of that cost. In any event, the discrimination is quite clear.

“The petitioner points out that the sellers were saved traveling expenses, salesmen's salaries and commissions, telephone and telegraph charges, the expense of correspondence with brokers and salesmen. Therefore, says the petitioner, the prices paid by it were not discriminatory, since reductions in price were paid for by valuable services. *Inherent in these very arguments which the petitioner makes is the inescapable conclusion that the sums 'saved' to the sellers allegedly because they were not compelled to pay brokers, were not saved to them at all, but were merely translated into*

⁴ H. Rep. No. 2287, 74th Cong. 2d Sess. 15 (1936).

another form to the financial benefit of the petitioner."⁵ (Italics added)

The Federal Trade Commission recently reported to Congress on an investigation and study of integration and concentration of economic power at the retail level of distribution in the food industry.⁶ In an interim report submitted to Congress on June 30, 1959, the Commission shows that chain food retailers with 11 or more stores had a sales increase of 117.9% from 1948 to 1958, whereas smaller operators increased their sales by 58% for the same period.⁷

The relative purchasing power of food chains has also been increased by a substantial number of merger acquisitions. The Commission's Interim Report shows that from 1949 through 1958, a total of 2238 food stores, with total annual sales at the time of acquisition of \$1,916,452,000.00 were taken over in 315 horizontal acquisitions by food chains.⁸

Ten of the most active chains in the merger movement acquired 1474 stores in 107 transactions from 1949 through 1958. The total annual sales of these stores when acquired was \$1,201,104,000.00.⁹

The diversion of brokerage to large favored buyers, in the manner of the case at bar, will lead to discriminations causing severe competitive injury to independ-

⁵ *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission* 106 F. 2d 667, 672 (1939) cert. denied, 308 U.S. 625 (1940).

⁶ Federal Trade Commission Economic Inquiry Into Food Marketing Interim Report, June 30, 1959. See Commission's resolution dated October 9, 1958.

⁷ *Id.* Chains, Table 2.

⁸ *Id.* Chains, Table 6.

⁹ *Id.* Chains, Table 6a.

ent food retailers even when the unfair advantage given to their large competitors amounts to a small percent.

“It is clear from this record that retail distributors of food products in the United States are engaged in a close contest. Profit margins are slight. The difference between profitable operation and loss is fractional in character; between success and failure, astonishingly small. There is constant incessant struggle for advantages. In such a situation, where margins between profit and loss are so small, any dealer engaged in the contest, having secured an unfair advantage over his competitors, however small it may be, will be likely to upset or reverse a small percentage of profit in his competitor and convert it into a loss. When the net profit is in the neighborhood of 2%, an advantage of 5% in buying in one dealer immediately places him in an overpowering position so far as his competitors are concerned.”¹⁰

In the case at bar, the respondent agreed to take reduced brokerage and knowing and intending that its principal, the seller would grant the amount of brokerage reduction as a part of a discriminatory discount in price to a favored buyer.¹¹ Respondent's agreement to take the reduced brokerage was the indispensable element of the discrimination received by the favored buyer in question. The fact that the brokerage diversion by respondent to the buyer “was not direct,” but “was more subtle does not change its purpose or

¹⁰ *United States v. New York Great Atlantic & Pacific Tea Company* 67 F. Supp. 626, 677 (1946), aff'd 173 F. 2d 79 (CA 7th 1949).

¹¹ R. 19, 25, 91.

effect.”¹² Section 2(c) “equally condemns” the “tendency and general results.”¹³

CONCLUSION

The decision of the Court of Appeals should be reversed and the order of the Federal Trade Commission reinstated.

Respectfully submitted,

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September 30, 1959

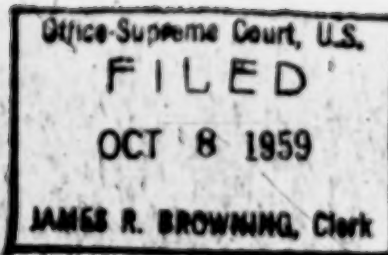
¹² Cf. *Modern Marketing Service v. Federal Trade Commission* 149 F. 2d 970, 978-979 (CA 7th, 1945).

¹³ *Webb-Crawford Co. v. Federal Trade Commission* 109 F. 2d 268, 270 (CA 5th, 1940), cert. denied, 310 U.S. 638 (1940).

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SUPREME COURT, U. S.

No. 61



In the Supreme Court of the United States

OCTOBER TERM, 1959

FEDERAL TRADE COMMISSION, PETITIONER

v.

HENRY BROCH AND COMPANY

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT**

BRIEF FOR THE FEDERAL TRADE COMMISSION

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT**

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINION BELOW

The opinion of the Court of Appeals (R. 218-224) is reported at 261 F. 2d 725.

JURISDICTION

The judgment of the Court of Appeals (R. 225) was entered on December 11, 1958. The time for filing a petition for a writ of certiorari was extended by order of Mr. Justice Clark on March 2, 1959, to May 9, 1959 (R. 226). The petition for a writ of certiorari was filed on May 6, 1959, and was granted on June 15, 1959 (R. 226). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 2(c) of the Clayton Act, which makes it unlawful for "any person" to pay or grant brokerage, or any allowance in lieu thereof, to the other party to a purchase or sale transaction, applies to a seller's broker who grants or allows part of his brokerage commission to a buyer.

2. Whether within the meaning of Section 2(c), a seller's broker grants part of his commission, or an allowance in lieu thereof, to the buyer, when he accepts a lower commission on sales to a particular buyer in order to enable the latter to obtain a discriminatorily lower price from the seller.

STATUTE INVOLVED

Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13, provides:

That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

STATEMENT

The Federal Trade Commission charged in its complaint (R. 2-5) that respondent Henry Broch and Company ("Broch"), a partnership, while engaged in commerce as a broker or sales agent for seller principals, violated Section 2(c) of the Clayton Act by granting and allowing a portion of its brokerage fee to one large buyer in connection with that buyer's purchase of a food product (apple concentrate) in commerce from a particular seller.

In its answer (R. 6-10), Broch admitted that it was engaged in commerce as a broker or sales representative of seller principals; that the then current price of the commodity involved in the sale cited by the complaint was \$1.30 per gallon; that this price was reduced to \$1.25 by the seller in the instance cited; and that instead of being reimbursed by the seller at a previously agreed-upon rate of 5%, it accepted a 3% brokerage payment on that sale. All other allegations of the complaint were denied.

After hearings, the examiner filed an initial decision concluding that Broch had violated Section 2(c) as charged, and proposed a cease-and-desist order (R. 173-202). Broch appealed to the Commission which, after receiving briefs and hearing oral argument, denied the appeal and adopted the examiner's findings as to the facts, conclusion and order as "the decision of the Commission" (R. 211).

The basic facts, as found by the examiner and supplemented by uncontradicted evidence in the record, are not in dispute.

Broch is a broker or sales representative for about 25 principals who sell food products, and it negotiates an annual volume of sales approximating \$4,000,000 to \$5,000,000 (R. 175-176). Among these seller principals is Canada Foods Limited, a Canadian processor of apple concentrate and similar products (R. 176-177). Canada Foods is also represented in the United States by several other brokerage firms, including Tenser & Phipps, Poole Company, and Cuyler (R. 178). The sales involved in this case were made to the J. M. Smucker Company ("Smucker"), of Orrville, Ohio, a manufacturer of apple butter and preserves (R. 176).

During negotiations in April and May 1954, Broch agreed to act as broker for Canada Foods, and its commission was established at 5% (R. 14, 74, 135, 149, 153, 178; Comm. Ex. 36, R. 127; Comm. Ex. 1C, R. 227, 229). Brokers, other than Broch, were appointed with the understanding that their commission would be 4% (R. 178). Broch received a higher commission because it stocked merchandise in advance of sales (*ibid.*).

On October 13, 1954, Canada Foods established its price on its 1954 pack of apple concentrate at \$1.30 per gallon in 50-gallon steel drums, and authorized its various brokers, including Broch, to negotiate sales at that price (R. 144-145, 179; Comm. Ex. 14, R. 108; Comm. Ex. 22, R. 114).

The first attempt to sell the 1954 pack of Canada Foods' apple concentrate to Smucker was made not by Broch but by Phipps (of Tenser & Phipps), who contacted Smucker about October 1, 1954, several

weeks before Broch first contacted that buyer (R. 178). Upon receiving the quotation from Canada Foods, Phipps advised Smucker of the \$1.30 price (R. 179).

Sometime between October 15 and 18, 1954, Smucker told Phipps that it was interested in purchasing approximately 500 barrels of the concentrate, but at a price lower than \$1.30 (R. 179). Phipps transmitted this counter-proposal to Canada Foods, and discussed it in person with Canada Foods' manager on October 19, 1954. The latter told Phipps that \$1.30 was Canada Foods' best price and that if it were not for a subsidy on apples by the Canadian Government, Canada Foods could not even sell at that low price (R. 179-180). This decision of Canada Foods to adhere to its established \$1.30 price on the Smucker offer was immediately transmitted by Phipps to Smucker (R. 180). On October 20, 1954, Phipps attempted to secure a 10-day option from Canada Foods for Smucker on 500 to 700 barrels of apple concentrate at \$1.30 (*ibid.*). Canada Foods replied by letter of October 25, 1954, that it could not hold the \$1.30 price for the period requested since, in its estimation, the price was liable to rise (*ibid.*).

As late as October 26, 1954, Smucker specifically offered to purchase through Phipps 500 gallons of Canada Foods' concentrate at \$1.25 (*ibid.*). Phipps wired the offer to Canada Foods that same day (R. 180-181). On October 27, 1954, Canada Foods' manager telephoned Phipps, again stating that his lowest price was \$1.30, and that the only way that the price

could be lower would be if the brokerage were cut (R. 181). Phipps relayed the information to Smucker, explaining that the order could not be confirmed at \$1.25 since Phipps was afraid that this would violate the Robinson-Patman Act (R. 181; Comm. Ex. 30, R. 121).

A day or two before the foregoing events of October 27, 1954, Broch contacted Smucker in an effort to sell apple concentrate on behalf of Canada Foods (R. 183). Smucker told Broch that it already had an offer from Canada Foods for \$1.30 but that it would be interested in buying 500 drums at a lower price (*ibid.*). With knowledge that Canada Foods, through another broker, was already negotiating to sell Smucker approximately 500 drums of concentrate and was holding to its \$1.30 price (R. 52-53, 57), Broch called Canada Foods and stated it could make the sale if the price were \$1.25 per gallon (R. 183). Canada Foods took the proposition under advisement (*ibid.*). On October 27, 1954, the very day that Canada Foods told Phipps that the price could be reduced below \$1.30 only if brokerage were cut, Canada Foods telephoned Broch and advised that it would make the sale at \$1.25 per gallon provided Broch would agree to reduce its brokerage commission from 5% to 3% (R. 183-184). Broch agreed and advised Smucker that Canada Foods would sell to it at \$1.25 per gallon (R. 184). The sale of 500 steel drums of apple concentrate at \$1.25 per gallon was consummated (R. 184), delivery made (R. 185),

and Broch received 3% brokerage rather than the usual 5% (*ibid.*).¹

The reduced price of \$1.25 (accomplished in part through the reduction in brokerage) was thereafter accorded Smucker on all subsequent sales consummated through Broch in December 1954, in 1955, and up to the time that the hearings in this matter were closed in October 1956 (R. 185). On sales to all other customers, whether made through Broch or other brokers, the price continued to be \$1.30 per gallon, and in each instance the broker, including Broch, received its full agreed-upon commission (R. 149-150, 185). It was only on sales to the one favored customer, made through Broch, that the selling price and brokerage were reduced (R. 35, 45, 185).

The Commission held that Section 2(c) of the Clayton Act "prohibits a broker, acting solely for the seller and not controlled by the buyer, from passing on, directly or indirectly, to the buyer any part of his brokerage" (R. 208). It stated (R. 198) that "it was agreed

¹ Broch and the seller principal participated equally in the price concession granted the favored buyer. The sales to the favored buyer evidenced by the record amounted to \$40,736.80 (R. 185). The customary brokerage fee of 5% to Broch on these sales would have been \$2,036.84. The actual brokerage of 3% received by Broch on these sales amounted to \$1,222.11. The total reduction in brokerage (\$2,036.84 minus \$1,222.11) amounted to \$814.73, which is exactly 50% of the total price reduction of \$1,629.47 granted by the seller principal, in cutting the price five cents per gallon. The latter computation is based on the figures set forth in Commission Exhibit 18, R. 231. While the exhibit shows, on the basis of a different calculation, that the broker contributed 55%, and the seller 45%, to the reduction in price (R. 232), the underlying data support our present conclusion of equal participation.

between" Broch and Canada Foods that Broch "would receive a commission of 5 per cent on sales made by them"; that "[b]y accepting a commission of 3 per cent * * * [Broch was] giving up part of what they were entitled to receive, with full knowledge of the fact that their contribution would redound to the benefit of the buyer in the form of a price concession" (R. 198); and that this "constitutes a payment of part of their commission to the buyer exactly as though [Broch] had paid two percent of their commission to the buyer direct" (R. 209; see R. 199). Accordingly, the Commission held that Broch, by "granting and allowing, directly or indirectly, a portion of the commission or brokerage fee to which they are entitled from their seller principal * * * to * * * a buyer of food products in commerce, in connection with such buyer's purchase of food products in commerce" (R. 200), had violated Section 2(c) (R. 201), and issued its order directing Broch to cease and desist from such practices (R. 202, 211).

The Court of Appeals for the Seventh Circuit set aside the Commission's order.² The court held that "Neither the language of § 2 * * * (c) nor its legislative history indicates that a seller's broker is covered by § 2(c)" (R. 222). The court said that although the Commission had found that "Broch's acceptance of a reduced brokerage constituted a payment of part of their commission to Smucker, exactly as

² Judge Schnackenburg's opinion for the court stated that the Commission's findings of fact were not questioned and that "our duty [is] to apply the law to the facts and to determine whether [the Commission's] process of legal reasoning when applied to the facts is correct" (R. 219).

though Broch had paid 2% 'of their commission to the buyer direct'"; the facts merely showed that "because of Broch's agreement to reduce its commission, the seller was able to reduce its price"; and the court concluded that "[n]either in substance nor in fact, directly or indirectly, did Broch pay anything to Smucker" (R. 223-224). The court stated further that the Commission had "interested itself in a private grievance between rival brokers" and it "doubt[ed] whether the public interest * * * can be said to have been served by this proceeding against the seller's broker" (R. 223). The court also said that the Commission's interpretation of Section 2(c) would "promote price rigidity and uniformity contrary to the national antitrust policy", and that prohibiting a price reduction, the basis of which was a lower commission payment to the seller's broker, would mean that, so far as sales price is concerned, a seller's "costs are frozen without regard for the welfare of the public" (R. 224).

SUMMARY OF ARGUMENT

I. The Court of Appeals erred in holding that Section 2(c) of the Clayton Act does not apply to a seller's broker.

A. Section 2(c) makes it unlawful for "any person" engaged in commerce to pay or grant brokerage "or any allowance or discount in lieu thereof * * * to the other party to such [purchase or sale] transaction * * * except for services rendered in connection with the sale or purchase" of merchandise. On its face, this broad prohibition plainly covers the payment or granting of brokerage, or an allowance in lieu thereof,

by a seller's broker to a buyer. "Any person" includes a seller's broker, and when the latter grants an allowance in lieu of brokerage to a buyer, he is making such allowance "to the other party to such transaction." The judicial decisions which have considered the problem also indicate that Section 2(c) applies to sellers' brokers. See, especially, *Oliver Bros., Inc. v. Federal Trade Commission*, 102 F.2d 763, 770 (C.A. 4).

B. The legislative history of the Robinson-Patman Act confirms that Congress did not intend to make any exception, in favor of sellers' brokers, to the broad prohibitions against brokerage payments in Section 2(c). It shows that what Congress sought to prohibit was the passing on of brokerage to the buyer, not merely the doing so by particular persons. The basic design of the Act was to eliminate all devices by which large buyers could obtain discriminatory preferences over their small competitors. From this viewpoint, it is immaterial whether it is the seller or the seller's broker who passes on brokerage to a buyer. For in either case the result is that the favored buyer obtains a price concession through receiving part of the brokerage. While it is true that the particular evil with respect to brokerage which was called to the attention of Congress was the payment of "bogus" brokerage to a "dummy" under control of the buyer, Congress did not limit the prohibitions of Section 2(c) to such transactions, but broadly prohibited "any person" from paying brokerage to the other party to the transaction except for services rendered in connection therewith. "[I]f Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particu-

lar application may not have been contemplated by the legislators.” *Barr v. United States*, 324 U.S. 83, 90.

The holding of the court below, that Section 2(c) contains an exception for brokerage payments made by a seller’s broker, would create a serious loophole in the basic Congressional design of preventing large buyers from gaining unfair preferences over small ones by virtue of their greater purchasing power.

II. The Commission correctly held that Broch granted a portion of its brokerage to Smucker, in violation of Section 2(c), when it accepted less than its agreed-upon commission on sales to this particular buyer, in order to enable the latter to obtain a discriminatorily lower price.

A. Although Broch had an agreement with the seller that it would be paid five percent brokerage for its services, it accepted three percent on sales to Smucker, in order to enable this large buyer to receive a lower price not given to any other purchaser. On sales to all other customers, made both through Broch and through other brokers, the seller maintained its regular price and the brokers received their agreed-upon commissions.

Section 2(c) was designed to outlaw all forms of brokerage payments or allowances which might be used as devices to give favored buyers a discriminatory price advantage. We submit that the Commission correctly held that Broch’s acceptance of the lower brokerage on sales to this particular buyer, done in order to enable the latter to receive a discriminatorily lower price, “constitutes a payment of part of their commission to the buyer exactly as though

[Broch] had paid two per cent of their commission to the buyer direct" (R. 209).

If the seller had paid Broch its full 5% brokerage and Broch had turned two-fifths of that amount over to the buyer, Broch would clearly have granted an allowance in lieu of brokerage to the buyer. But the economic effect was the same when Broch accepted a two-fifths reduction in its own commission, in order to enable the seller to pass the reduction on to the particular buyer in the form of a lower price. In both instances, a large purchaser is able to obtain a price concession, not available to smaller purchasers, through the device of the broker passing on to him part of his brokerage. That is precisely the kind of discriminatory favoritism that the Clayton Act was designed to prevent.

B. Respondent emphasizes the Court of Appeals' statement (R. 224) that the Commission's construction of Section 2(c) "would actually promote price rigidity and uniformity contrary to the national anti-trust policy." Although, broadly speaking, "national antitrust policy" is to remove artificial restraints on free price competition, Congress has also determined that, because of their long-term consequences, certain forms of price competition such as concessions to favored buyers are unfair and contrary to the public interest. Thus, while the short run effect of prohibiting Broch from passing on part of his brokerage to the buyer may be viewed as tending toward "price rigidity and uniformity," Congress has decided that ultimately the public interest will be better served by preserving small retailers by protecting them against

the competitive advantage which large buyers would obtain if brokerage were passed on to them. To that extent the policy of the law, as here applied, complements rather than contradicts "antitrust policy".

Contrary to respondent's contention, the prohibitions of Section 2(c) are not limited to brokerage payments or allowances which involve "secret discriminations"; they also cover "open" payments or allowances. Nor did Congress intend that the only method for dealing with open price discriminations, accomplished through brokerage, is by proceeding against the seller for violating the price-discrimination prohibitions of Section 2(a).

ARGUMENT

I.

THE PROHIBITION IN SECTION 2(C) OF THE CLAYTON ACT AGAINST "ANY PERSON" PAYING BROKERAGE, OR AN ALLOWANCE IN LIEU THEREOF, TO THE OTHER PARTY TO A PURCHASE OR SALE TRANSACTION, APPLIES TO A SELLER'S BROKER WHO PAYS OR ALLOWS PART OF HIS BROKERAGE COMMISSION TO A BUYER

Section 2(c) of the Clayton Act makes it unlawful for "any person" engaged in commerce to pay or grant brokerage "or any allowance or discount in lieu thereof * * * to the other party to such [purchase or sale] transaction" or to any agent of the latter, "except for services rendered in connection with the sale or purchase" of merchandise. The Court of Appeals held that "[n]either the language" of this section, "nor its legislative history indicates that a seller's broker is covered by" it. We shall show, how-

ever, that the language of this section does cover seller's brokers; that its legislative history and administrative construction confirm this view; and that holding it inapplicable to seller's brokers would create a serious loophole in the basic Congressional design of the Robinson-Patman Act of preventing large buyers from using their superior purchasing power to gain a competitive advantage over small buyers.

A. On its face, Section 2(c) plainly covers the payment of brokerage (or an allowance in lieu thereof³) by a seller's broker to a buyer. The prohibition applies to the payment of brokerage by "any person"; there is no exception for a seller's broker. When a seller's broker pays brokerage to the buyer, he is making such payment "to the other party to such transaction." For the broker is the representative of one party to the transaction (the seller), and the buyer is the "other party" thereto. Finally, the buyer plainly does not render any services to the broker for which he could be compensated. The payment of brokerage by a seller's broker to a buyer, therefore, comes within the specific terms of Section 2(c).⁴

³ We shall use the word "brokerage" to refer to the payment of brokerage or an allowance in lieu thereof.

⁴ Respondent contends (Br. in Opp. 12) that throughout the Robinson-Patman Act the phrase "any person" "refers only to seller and buyer parties in commercial transactions" and that the phrase in Section 2(c) should therefore not be construed to cover seller's brokers. But there is nothing in the other subdivisions of the Robinson-Patman Act which limits the broad phrase "any person" to buyers and sellers; the furnishing of illegal/discriminatory services or facilities would equally violate

Judicial decisions also indicate that Section 2(c) applies to seller's brokers. In *Oliver Bros., Inc. v. Federal Trade Commission*, 102 F. 2d 763 (C.A. 4), the court upheld a Commission order under Section 2(c) prohibiting a buyer's broker from receiving brokerage from the sellers and paying it to the buyer. One of the attacks on the order was that the brokerage payments came within the exception in Section 2(c) because they were made for services rendered to the seller. Judge Parker, writing for a unanimous court, rejected the argument on the grounds that the commissions were actually received by the buyers and not by Oliver (the broker), and that "there can be no contention that any services are rendered by the buyers to justify the payment of compensation to them" (p. 769). The court further went on to state, however (p. 770):

And even if it were true that Oliver rendered services to the sellers, we do not think this would change the situation. *No one would contend that, without violating this section, a broker representing the seller could give his commissions to the buyer; for in such case the action of the broker would be the action of his principal, the seller, and would amount to the allowance of commissions by the seller to the other party to the transaction in direct violation of the statutory provision. * * **
[Emphasis added.]

Section 2(e) whether done by the seller or by the latter's broker. Furthermore, the other subsections of the Robinson-Patman Act usually involve only a seller and a buyer, and not an intermediary; Section 2(c), on the other hand, necessarily involves a third person, the broker.

In *The Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F. 2d 667 (C.A. 3), certiorari denied, 308 U.S. 625, the court, in rejecting a similar contention that brokerage paid to a buyer's broker was compensation for services rendered to the seller, pointed out (p. 674) that:

The edge of the paragraph [Section 2(c)] cuts two ways, prohibiting the payment or receipt of commissions, discounts or brokerage to the adversary party by the other's agent.

The payment of brokerage by a seller's broker to a buyer constitutes a payment "to the adversary party [the buyer] by the other's [the seller's] agent." See, also, *Freedman v. Philadelphia Terminals Auction Co.*, 145 F. Supp. 820 (E.D. Penna.) where the court upheld, against a motion to dismiss, a complaint charging, *inter alia*, that a seller's broker had violated Section 2(c) by exacting from the buyers payments for services rendered for the sellers.

B. The legislative history of the Robinson-Patman amendments confirms that Congress did not intend to make any exception to the broad prohibitions against brokerage payments in Section 2(c) in favor of sellers' brokers.

The amendments "were enacted to eliminate" the "inequities" which resulted from the fact that, "[b]ecause of their enormous purchasing power," "large chain buyers" "were able to exact price concessions, based on differences in quantity" which put the "small independent stores * * * at a hopeless competitive disadvantage." *Federal Trade Commission v. Simplicity Pattern Co.*, 360 U.S. 55, 69. The overall

design of the Act was to eliminate all devices by which particular buyers obtained preferential treatment, except insofar as they came within the narrow justifications for price discriminations provided in Section 2(b) of the Act. *Id.*, pp. 66-67; H. Rep. No. 2287, 74th Cong., 2d Sess., pp. 3, 6, 7, 8-11; S. Rep. No. 1502, 74th Cong., 2d Sess., pp. 3, 5-6. One of the devices through which "the large purchasers" obtained "competitive advantages" over the small stores was by obtaining "[r]ebates * * * for 'brokerage fees,' even though no brokerage services had been performed" (*Simplicity* case, *supra*, p. 69).

The legislative history of Section 2(c) shows that what Congress sought to prohibit was the passing-on of brokerage to the buyer, not merely the doing so by particular persons or in any particular form. Thus, the House Committee report on the bill stated (H. Rep. No. 2287, 74th Cong., 2d Sess., p. 15) that the brokerage provision (which was then Section 2 (b)) "prohibits the direct or indirect payment of brokerage except for such services rendered"—that is, it "permits the payment of compensation by a seller to his broker or agent for services actually rendered in his behalf". Similarly, the Senate Committee report on the Senate bill, which did not contain the "for services rendered" exception, stated (S. Rep. No. 1502, 74th Cong., 2d Sess., p. 7) that Section 2(b) "forbids the payment or allowance of brokerage, either to the other principal party, or to an intermediary acting in fact for or under the control of the other principal party, to the purchase and sale transaction." Finally, the conference report likewise

states (H. Rep. No. 2951, 74th Cong., 2d Sess., p. 7) that Section 2(c) "prohibits the direct or indirect payment of brokerage except for such services rendered."

Further evidence that Congress intended broadly to prohibit any payment or passing on of brokerage to the buyer (except for services rendered), regardless of the mode used in the particular transaction, and not just payments by the seller, is contained in the debates on the floors of Congress. Thus, Senator Logan, the chairman of the subcommittee which considered the bill, and its manager in the Senate, made the following statements during a floor colloquy on the measure prior to passage (80 Cong. Rec. 3115):

Mr. GEORGE. What I wanted to get perfectly clear, if I could, was whether the same prohibitions relate to both the giver and the taker of a rebate in any form.

Mr. LOGAN. *The prohibition is against its being done at all*, and, of course, it would apply to the giver as well as to the taker, although there is no criminal penalty provided.

* * * * *

Mr. GEORGE. I beg the Senator's pardon for interrupting his presentation. I had the impression that the bill did impose penalties on the giver of a rebate, and I wanted to know whether it imposed like prohibitions, or penalties or whatever the bill provides, on the taker.

Mr. LOGAN. *The bill prohibits the act*, and that prohibition would extend to all who are affected by it. [Emphasis added.]

See, also, the statement by Representative Patman, the co-author of the bill, that "The measure also pro-

hibits payment or allowance of brokerage, commission, or other sales compensation to buyers" (80 Cong. Rec. 5728).

Since the purpose of Section 2(c) was to prohibit "the act" of passing on brokerage to the buyer "being done at all" (*Logan* statement, *supra*), it is immaterial whether it is the seller or the seller's broker who performs the act. Both are equally obnoxious from the point of view of preventing a favored buyer from obtaining price concessions through receiving part of the brokerage, and both were prohibited by Congress. A mass buyer seeking price concessions through reduction of brokerage is interested solely in obtaining a preferential price; he is not concerned with whether the brokerage is passed on to him by the seller or by the seller's broker.

It is true, as respondent points out (Br. in Opp. 10-11), that the particular evil with respect to brokerage which had been called to the attention of Congress was the payment of "bogus" brokerage—that is, the situation in which a dummy, under the control of the buyer, was designated as a "broker," and the seller, by paying commissions to this "broker," was able to rebate part of the purchase price to the buyer.⁵ But Congress did not limit the prohibition of the payment of brokerage to payment by the seller to a broker under control of a buyer. On the contrary, it broadly prohibited "any person"

⁵ The payment of such "bogus" brokerage was described in the committee reports as "Among the prevalent modes of discrimination at which this bill is directed". H. Rep. No. 2287, 74th Cong., 2d Sess., p. 15; S. Rep. No. 1502, 74th Cong., 2d Sess., p. 7.

from paying brokerage to the other party to the transaction except for services rendered in connection therewith. "[I]f Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators." *Barr v. United States*, 324 U.S. 83, 90.*

. Congress, apparently recognizing that brokerage is susceptible of serious misuse as a device for giving preferential treatment to particular buyers, concluded that it was necessary broadly to ban all brokerage payments made by the seller or his agent to the buyer, except for services actually rendered by the broker to the former. To read Section 2(c) as containing

*The applicability of Section 2(c) to sellers' brokers is further supported by the "consistent administrative construction of the Act" (*Federal Trade Commission v. Mandel Brothers*, 359 U.S. 385, 391). In 1940, four years after its passage, the Commission issued its first complaint under Section 2(c) against a seller's broker; the following year it entered a cease-and-desist order against him. *W. E. Robinson & Co., Inc.*, 32 F.T.C. 370. Additional complaints were issued in 1941 (*D. J. Easterlin & Co.*, 33 F.T.C. 1639 (case dismissed; docket shows practices were discontinued)) and in 1945 (*Custom Housing Packing Corporation*, 43 F.T.C. 164 (cease-and-desist order entered on consent, September 23, 1946)). Subsequent to the complaint in the instant case, the Commission has issued a number of complaints charging sellers' (or, as they are sometimes called, primary) brokers with violating Section 2(c). (These complaints are listed in the Appendix, *infra*, p. 30.) While there have not been many cases prior to the instant one in which the Commission proceeded under Section 2(c) against a seller's broker, the significant fact is that it did initiate such a case shortly after the Act was passed, and that it has consistently adhered to the view that the Act does cover such persons.

Writers in the field who have considered the question have uniformly concluded that Section 2(c) is not limited to pro-

an exception for brokerage payments by a seller's broker to a buyer, would create a serious loophole in the basic Congressional design of preventing large buyers from gaining unfair preferences over small ones by virtue of their greater purchasing power. For the holding of the court below would permit a large buyer to demand and receive from a seller's broker a substantial direct rebate of part of the latter's commission. From the viewpoint of protecting the small independent purchaser against such dis-

hibiting the payment of brokerage by the seller but also bans such payment by the seller's broker (sometimes referred to as an independent broker). For example, Congressman Patman, the co-author of the statute, gave an affirmative answer to the question whether the Robinson-Patman Act "prohibit[s] a broker from splitting his brokerage with a buyer." He pointed out that the Act "applies to any person. The intent of Congress, the reports of committees, and the Act are all specific on this point. The payment of any brokerage by the seller to the buyer is prohibited. The relationship of the broker to his principal is a fiduciary one. He is, in fact, representing the seller in this instance and would be liable." (Patman, *The Robinson-Patman Act* (1938), p. 108.)

See, also, Austin, *Price Discrimination and Related Problems Under the Robinson-Patman Act*, American Law Institute, Revised Ed. (November 1953), p. 108:

"Section 2(c) applies to transactions between an intermediary and a buyer, even where the seller is not involved. A broker, even though acting solely for the seller and not controlled by the buyer, may not split his commission with the buyer nor pass on brokerage to the buyer in the form of advertising allowances or promotion services."

Professor Oppenheim, the co-chairman of the Attorney General's National Committee to Study the Antitrust Laws, has concluded (Oppenheim, *Administration of the Brokerage Provision of the Robinson-Patman Act*, 8 Geo. Wash. L. Rev. 511, 544 (1940)) that "[o]bviously even an independent broker cannot split his commissions with the buyer."

crimination, it is immaterial whether the favored buyer receives brokerage directly from the seller, or obtains the same amount from the broker as a rebate. Indeed, in cases in which the broker bills the buyer directly, the latter may not know, and certainly does not care, whether the lower price which he receives represents a passing on to him of part of the broker's commission, or a reduction in the seller's price.

II

BROCH GRANTED AN ALLOWANCE IN LIEU OF BROKERAGE TO THE BUYER WHEN IT ACCEPTED A LOWER COMMISSION IN ORDER TO ENABLE THE FAVORED BUYER TO OBTAIN A DISCRIMINATORILY LOWER PRICE FROM THE SELLER

In Point I, *supra*, we have argued that the prohibitions of Section 2(c) apply to a seller's broker. We shall now show that the Commission correctly held that the seller's broker (Broch) granted an allowance in lieu of brokerage to the buyer (Smucker) when it accepted a smaller amount than the previously agreed-upon commission, in order to enable the particular buyer to receive a discriminatorily lower price from the seller. Of course, it is well settled that "The weight to be given to the facts and circumstances admitted, as well as the inferences reasonably to be drawn from them, is for the Commission." *Federal Trade Commission v. Pacific States Paper Trade Association*, 273 U.S. 52, 63.

A. Broch had entered into an agreement with the seller under which it was to be paid 5% brokerage for its services. When it agreed to accept a 3%

commission on the sale to Smucker of 500 barrels of apple concentrate—a particularly large transaction (see note 7, *infra*, p. 24)—it was aware that the buyer had already rejected an offer from another broker at \$1.30 per gallon, and it had advised the seller that it could make the sale at \$1.25. In agreeing to sell at the lower price, the seller expressly conditioned the offer on Broch's reducing its brokerage commission from 5% to 3%. Significantly, the effect of this reduction by Broch was that Broch and the seller split the amount of the price concession equally (see note 1, *supra*, p. 7). Furthermore, the seller gave the lower price of \$1.25 only to Smucker and it was only with respect to this particular purchaser that Broch received a lower commission. All other sales to all other purchasers made through all brokers, including Broch, were made at the seller's regular price of \$1.30, and on all of them the brokers received their regular agreed-upon commission. As the examiner correctly concluded (R. 198), "[b]y accepting a commission of 3 per cent * * * respondents were giving up part of what they were entitled to receive, with full knowledge of the fact that their contribution would redound to the benefit of the buyer in the form of a price concession."

Section 2(c) was designed to outlaw all forms of brokerage payments or allowances which might be used as devices to give favored buyers a discriminatory price advantage. See *supra*, pp. 16-20. To this end, the Act broadly makes it unlawful "to pay or grant, or to receive or accept, anything of value as a

commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered." We submit that the Commission correctly held that Broch's acceptance of the lower brokerage on sales to Smucker "constitutes a payment of part of their commission to the buyer exactly as though [Broch] had paid two per cent of their commission to the buyer direct" (R. 209).

Clearly, if the seller had paid Broch the full five percent brokerage to which it was entitled and Broch had turned over 40 percent of that amount to the buyer, Broch would have granted an allowance in lieu of brokerage to the buyer. But the economic impact upon the buyer and broker was the same when Broch accepted a 40-percent reduction in its commission, in order to enable the seller to pass that reduction on to the particular buyer in the form of a lower price. In either situation, the large purchaser is able to obtain a price concession not available to smaller purchasers,⁷ through the device of the broker passing on to him part of his brokerage fee. As we have shown (see *supra*, pp. 16-22), that is precisely the kind of discrimi-

⁷ Smucker's purchase of 500 barrels was an unusually large sale, far greater than the buyer and broker had anticipated would be made by the broker (R. 6). The examiner pointed out (R. 188) that when Broch was appointed as a broker by Canada Foods in the fall of 1954, "it was contemplated that he would sell approximately 1,000 drums a year to all his customers"; that Broch testified "that it was contemplated the sales to any one customer would not exceed 50 to 100 drums"; and that the seller's official with whom Broch had dealt had had the "impression that no one in the United States could use more than 250 barrels". See R. 75, 134-135, 154.

natory favoritism that the Clayton Act was designed to prevent. The buyer's dealings were with Broch, not with the seller; and it was Broch who passed along the price reduction to the buyer. Under a realistic reading of the Act, therefore, Broch did grant an allowance in lieu of brokerage when, in order to insure that a favored large buyer would obtain a discriminatorily lower price, it accepted a reduction in its own usual commission.⁸ The ruling of the court below that the facts showed only that "because of Broch's agreement to reduce its commission, the seller was able to reduce its price," and that "[n]either in substance nor in fact, directly or indirectly, did Broch pay anything to Smucker" (R. 224), ignores the realities of the transaction and exalts its form over its substance.

B. Respondent emphasizes (Br. in Opp. 1, 15-16) the Court of Appeals' statement (R. 224) that the Commission's construction of Section 2(c) in this case "would actually promote price rigidity and uni-

⁸ The Commission does not contend that the granting by a seller of a lower price to a particular buyer, coupled with a reduction in brokerage, "automatically" compels the conclusion that there has been a payment of brokerage to the seller. On the contrary, the Commission has made it clear that whether there has been a payment of brokerage in such circumstances depends upon all the facts in the particular case. *Main Fish Co., Inc.*, 53 F.T.C. 88 (July 30, 1956). Of course, the granting of a lower price to a favored buyer may involve the payment of brokerage to the buyer. *The Great Atlantic and Pacific Tea Co. v. Federal Trade Commission*, 106 F. 2d 667, 672-673 (C.A. 3), certiorari denied, 308 U.S. 625; *Southgate Brokerage Co. v. Federal Trade Commission*, 150 F. 2d 607, 611 (C.A. 4), certiorari denied, 326 U.S. 774.

formity contrary to the national antitrust policy"; and it urges (Br. in Opp. 8, 15) that the decision below is in accord with this Court's observation that the Robinson-Patman Act must be "reconcil[ed] * * * with the broader antitrust policies that have been laid down by Congress." *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61, 74. Although, generally speaking, the general "national antitrust policy" is to remove artificial restraints upon free price competition, Congress has also determined that, because of their long-term consequences, certain forms of price competition are not in the public interest. Thus, although price concessions to favored buyers may, in the first instance, permit such buyers to pass these concessions on to the public in the form of lower prices, Congress has recognized that such "[u]nfair trade practices and monopolistic methods which in the end destroy competition, restrain trade, and create monopoly have never in all history resulted in benefit to the public interest. On the contrary, for the most part, they have been symbolic * * * in the end [of] high prices to consumers and large profits to the owners" (H. Rep. No. 2287, 74th Cong., 2d sess., p. 17).

In the instant case, the short-run effect of prohibiting Broch from passing on part of its brokerage to the buyer may be viewed as tending toward some "price rigidity and uniformity." Congress, however, has decided that ultimately the public interest will be better served by protecting small retailers against the competitive advantage which large buyers would obtain if brokerage could be passed on to them, and thereby to preserve the economic position of the small

merchants as a vital link in the distributive process. In this respect the objectives of the Sherman and the Robinson-Patman Acts are complementary rather than contradictory; Congress has made the judgment that, whatever may be the immediate consequences of the particular practices condemned in Sections 2(a) to 2(e) of the Clayton Act, in the long run they are likely to have an adverse effect on the public interest, and should therefore be proscribed along with other practices destructive of fair competition such as monopolies and restraints of trade.

Respondent further contends (Br. in Opp. 11) that the prohibitions of Section 2(c) are limited to brokerage payments which involve "‘secret’ discriminations." A simple example will refute this contention. If a seller dispensed with his broker's services in making a particular sale, and then openly reduced the selling price by the exact amount of brokerage involved, this would constitute an allowance "in lieu of brokerage" by the seller to the buyer in violation of 2(c). In such a case, however, the illegal allowance would be completely "‘open’ and obvious from the face of the invoice * * *" (Br. in Opp. 10). In other words, contrary to respondent's suggestion (Br. in Opp. 11), Congress did not intend that the only procedure for dealing with "open" brokerage payments or allowances to a seller, which are the means of accomplishing illegal price discriminations, is by proceeding against the seller for violating the price-discrimination prohibitions of Section 2(a). For Congress has singled out the payment or allowance of brokerage as a separate and distinct violation in

Section 2(c); and the Commission may proceed against any violation thereof, without regard to whether other aspects of the same transaction might violate other sections.*

*The court below, citing *Federal Trade Commission v. Klesner*, 280 U.S. 19, expressed doubt that the instant proceeding was in the public interest (R. 223). The *Klesner* case arose under the Federal Trade Commission Act, 38 Stat. 717, which authorizes the Commission to proceed against unfair methods of competition only if it appears to the Commission that a proceeding "would be to the interest of the public" (Section 5). But there is no such limitation in a proceeding under Section 11 of the Clayton Act, 15 U.S.C. 21, to enforce Section 2(c) of the Act. The distinction in this respect between a proceeding to enforce the Trade Commission Act and a proceeding to enforce Section 2(c) of the Clayton Act is succinctly stated in *Webb-Crawford Co. v. Federal Trade Commission*, 109 F. 2d 268, 269 (C.A. 5), as follows: "The Congress considered the effect on commerce of the things named in subsection (c), and absolutely prohibited them. The trade commission is not to enter on any enquiry about their evil effect, nor whether a proceeding would be in the public interest. Its duty is to enforce the prohibition." In any event, a proceeding to eliminate anti-competitive practices condemned by Congress plainly is in the public interest, even though it be described as a "private grievance between rival brokers" (R. 223) and the discriminatory practices resulted in favoring only a single buyer. Cf. *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 211.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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OCTOBER 1959.

APPENDIX

FEDERAL TRADE COMMISSION PROCEEDINGS (INSTITUTED AFTER THE INSTANT CASE) IN WHICH SELLERS' BROKERS HAVE BEEN CHARGED WITH VIOLATING SECTION 2(C) OF THE CLAYTON ACT

<i>Case</i>	<i>Date Complaint Issued</i>	<i>Disposition</i>
<i>Daniel H. Sobo, et al.</i> (Docket No. 6633) (buyers also charged).	Sept. 13, 1956.	Cease-and-desist order, March 22, 1957 (consent).
<i>Dehn & Co., Inc., et al.</i> (Docket No. 6977).	Dec. 12, 1957.	Cease-and-desist order, July 3, 1958 (consent).
<i>Gavin Bros., Inc., et al.</i> (Docket No. 6978).	Dec. 12, 1957.	Cease-and-desist order, July 3, 1958 (consent).
<i>McGovern and McGovern, et al.</i> (Docket No. 6980).	Dec. 12, 1957.	Cease-and-desist order, July 3, 1958 (consent).
<i>The Salmon and Tuna Sales Company, et al.</i> (Docket No. 6981).	Dec. 12, 1957.	Cease-and-desist order, July 3, 1958 (consent).
<i>Ivar Wendt</i> (Docket No. 6982).	Dec. 12, 1957.	Cease-and-desist order, July 3, 1958 (consent).
<i>Wards Cove Packing Company, et al.</i> (Docket No. 7021) (seller also charged).	Dec. 31, 1957.	Cease-and-desist order, July 3, 1958 (consent).
<i>F. A. Gosse Company, et al.</i> (Docket No. 7099).	Mar. 27, 1958.	Cease-and-desist order, October 16, 1958 (consent).
<i>Puget Sound Brokerage Co., et al.</i> (Docket No. 7151).	May 20, 1958.	Cease-and-desist order, February 17, 1959 (contested).
<i>C. F. Buelow Company, et al.</i> (Docket No. 7154).	May 26, 1958.	Cease-and-desist order, November 19, 1958 (consent).
<i>Parks Canning Company, Inc., et al.</i> (Docket No. 7200) (seller also charged).	July 18, 1958.	Cease-and-desist order, February 12, 1959 (consent).
<i>E. H. Hamlin Associates, et al.</i> (Docket No. 7204).	July 23, 1958.	Cease-and-desist order, February, 12, 1959 (consent).
<i>Point Adams Packing Co., et al.</i> (Docket No. 7210) (seller also charged).	July 23, 1958.	Cease-and-desist order, December 5, 1958 (consent).
<i>Emard Packing Co., Inc., et al.</i> (Docket No. 7249) (seller also charged).	Sept. 11, 1958.	Cease-and-desist order, February 12, 1959 (consent).

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No. 61

IN THE
Supreme Court of the United States

OCTOBER TERM, 1959

FEDERAL TRADE COMMISSION, *Petitioner*

HENRY BROCH & COMPANY, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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IN THE
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OCTOBER TERM, 1959

No. 61

FEDERAL TRADE COMMISSION, *Petitioner*

v.

HENRY BROCH & COMPANY, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

PRELIMINARY STATEMENT

The legal theory advocated by the Federal Trade Commission in this case raises serious questions in the administration of a coordinated national antitrust policy.¹ The Court of Appeals concluded that the Commission's statutory interpretation "would actually

¹ Both the petition and the brief filed on behalf of the FTC lack the customary signature of the Antitrust Division of the Department of Justice. The Solicitor General's petition advises that "In appearing herein as legal representative of the Commission, the Department of Justice intimates no views of its own as to the underlying policy considerations that may be involved" (Pet. 12 n. 7).

promote price rigidity and uniformity contrary to the national antitrust policy" (R. 224). Since the Commission does not dispute that at least the "short run effect" of its enforcement of the Robinson-Patman Act is "tending toward 'price rigidity and uniformity'" (FTC Br. pp. 12, 26), once again called into play is this Court's formula, pronounced in the landmark *Automatic Canteen* case, "to reconcile such interpretation, except where Congress has told us not to, with the broader antitrust policies that have been laid down by Congress." 346 U.S. 61, 74 (1953).

OPINIONS BELOW

The opinion of the Court of Appeals (R. 218-224) is reported at 261 F. 2d 725 (1958). The opinion of the Federal Trade Commission (R. 204-211) is not yet officially reported.

QUESTION PRESENTED

As detailed by this Court in the *Simplicity Pattern* case last June, the Congressional plan in the Robinson-Patman amendments of the Clayton Act was to impose "absolute" and more severe prohibitions on certain "secret" and disguised price discriminations, such as "false brokerage allowances," than on open price differentials. 360 U.S. 55, 68, 69 (1959). Under the statutory provisions governing price discrimination, price differentials are lawful unless they impair competition, and cannot be "justified" by reference to the seller's cost savings or good faith meeting of competition. The "absolute" and unconditional ban on concealed discriminations was designed to force price variations out into the open, where they "could be more readily detected and where it would be much easier to make accurate comparisons with any alleged

cost savings," so that the "benefits of more economical processes" which Congress wished to preserve for the consumer would be "made available in *price* differentials or not at all." *Id.* at 68, 71 n. 18.

This proceeding concerns an open price reduction granted in a competitive situation by a seller to a buyer for a large quantity sale permitting cost economies, coupled with the acceptance of a smaller rate of commission by the seller's broker.

In a case of first impression (cf. Pet. 6), the FTC did not proceed against the seller or the buyer under the provisions pertaining to price discrimination. Instead, the Commission condemned the broker's acceptance of a reduced fee as tantamount to the broker's having "indirectly" paid an illicit brokerage allowance to the buyer within the meaning of the "absolute" prohibitions of Section 2(c) of the Act (R. 207-209). Upon review, the Court of Appeals unanimously set aside the Commission's order (R. 224).

The focal question before this Court is whether a broker taking a smaller rate of commission when the seller principal openly reduces his price is guilty of granting to the buyer an allowance "in lieu" of an illicit brokerage payment in violation of Section 2(c)—irrespective of the cost or competitive considerations which would make the seller's price lawful under the provision governing variations in price.²

² The Commission's brief has broadened the issue into two "questions" presented in obverse sequence (Br. p. 2). The first and hypothetical question *presumes* the issue to be decided under the second question, *i.e.*, it *assumes* that an illicit payment *is* made by a broker taking a smaller commission.

Furthermore, the Commission's "Questions Presented" intro-

STATUTE INVOLVED †

The pertinent provisions of the Clayton Act, as amended by the Robinson-Patman Act, are as follows—

Section 2(c), the so-called Brokerage Clause, declares:

“It shall be unlawful for any person * * * to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.” 15 U.S.C. § 13(c).

The pertinent text of Sections 2(a) and (b), prohibiting injurious and unjustified price discriminations by sellers, declares:

“It shall be unlawful for any person * * * to discriminate in price between different purchasers of commodities of like grade and quality * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person

duces the incorrect premise that respondent acted “in order to” facilitate a “*discriminatorily* lower price” (Cf. Br. p. 2, with Pet. 2) (Emphasis supplied throughout this brief). The fact is that the seller’s price reduction was open, competitive, and related to cost economies (see pp. 9-10, *infra*).

† FOR THE CONVENIENCE OF THE COURT, THE LEGISLATIVE HISTORY OF SECTION 2(c) IS REPRINTED AT THE END OF THIS BRIEF.

who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing * * * shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered * * *. 15 U.S.C. § 13(a).

“* * * *Provided, however*, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.” 15 U.S.C. § 13(b).

Section 2(f), defining the liability of the recipient of price discriminations, provides:

“It shall be unlawful for any person * * * knowingly to induce or receive a discrimination in price which is prohibited by this section.” 15 U.S.C. § 13(f).

STATEMENT

The Essential Facts

Respondent Henry Broch & Company, a partnership between Henry Broch and Oscar Adler, operates as an independent sales representative or broker by negotiating the sale of frozen foods and other food products for suppliers to processors and other buyers (R. 175). The sellers typically compensate respondent with a commission computed as a specified percentage of the sales price—ranging from 1 to 5½% depending on various considerations important to the respective prin-

principal (R. 22, 71, 130). Every sale negotiated by respondent is "subject to confirmation of seller," and no commission becomes due until after the seller has confirmed and the buyer has paid (R. 63-64; Pet. Ex. 2-A, R. 95; Res. Ex. 2, R. 157). Respondent transacts for its twenty-five seller principals an annual volume of \$4 to \$5 million, earning an average rate of 3% (R. 72, 175-176), *i.e.*, annual gross revenues below \$150,000.

The controversy here grows out of a sales transaction for apple concentrate negotiated by respondent in October 1954 for the seller, Canada Foods, Ltd., a processor of apples at Kentville, Nova Scotia, with the buyer, J. & M. Smucker of Orrville, Ohio, a maker of apple butter and preserves.

Respondent first represented Canada Foods in the spring of 1954, and was designated agent for the Midwest area at a prospective 5% rate of commission (Pet. Ex. 36, R. 127). The seller, who paid commission rates up to 10% in South America (R. 130), also appointed three other brokers in the United States, including Tenser & Phipps of Pittsburgh, Pa., at a 4% commission rate (R. 178).

While earlier quoting a price as high as \$1.85 per gallon of apple concentrate (Pet. Ex. 36, R. 127), Canada Foods in October 1954 instructed respondent as well as Tenser & Phipps to sell the 1954 pack at \$1.30 per gallon in fifty-gallon steel drums, \$1.25 in wooden barrels and \$1.32 in six-gallon cans (Pet. Ex. 22, R. 114).

In separate negotiations first with Tenser & Phipps and then with respondent with whom he dealt before (R. 75), Smucker offered to take about 500 steel drums, admittedly "an unusually large sale" (FTC Br. p. 24

n. 7), if he could buy at \$1.25 per gallon (R. 32, 51, 78-79). In the words of Smucker's purchasing agent, who also had offers of European concentrates, "we were offered the commodity at \$1.25 and we saw no reason why we should pay \$1.30 for the same item" (R. 53, 56). Smucker hence would go no higher than \$1.25 (R. 18).

Respondent transmitted the Smucker offer to Canada Foods by telephone, also informing the seller of the availability of competitive prices (R. 79-80).³ Canada Foods' manager told respondent he would "sharpen my pencil, and let you know" (R. 80). The next day he called back to accept Smucker's bid of \$1.25 per gallon, informing respondent, "You are going to receive three per cent brokerage" (R. 80), and giving him "permission to sell on these conditions" (R. 137). Respondent objected, but "he cut me off pretty fast," and so realized that nothing would be gained by haggling "because he told me that is it" (R. 80).

The sale to Smucker was accordingly consummated by respondent at \$1.25, a reduction of 5 cents per gallon, for an initial sale of 500 steel drums, supplemented by several other shipments (R. 82).

All elements of the transaction were fully reflected on the seller's and the broker's invoices and books, including the sales price of \$1.25 (Pet. Exs. 2-A-9, R. 95-103), and the broker's commission of 3% (Pet. Ex.

³ The accusation that respondent knew of the competitive activity of the other broker (FTC Br. pp. 6, 23) is not borne out by the record (R. 52-53, 57, 79), and is ill-taken in light of the industry-wide injunction prohibiting concerted restraints of trade by the organized food brokers including the coercion of brokers which solicit others' accounts. *National Food Brokers Ass'n*, 52 F.T.C. 372 (1955).

17, R. 111): The buyer paid the open invoice price of \$1.25, was neither apprised of nor concerned with any broker's commissions, and of course received nothing from the respondent (R. 54).

In the meantime, Phipps, the rival broker angling for the sale, also learned from the seller that he would have to take less than his expected 4% commission rate in such a transaction (R. 33, 36, 49). Phipps thereupon sent a letter warning Smucker, the buyer, that

"We could confirm the order at the price of \$1.25, but we are very much afraid that we would be right in the way of the Robinson-Patman Act and we might find our names in print.

"It would be a feather in somebody's cap to decorate us with the violation and further, we do not believe that you are the kind of folks that would want to go along with a deal of this kind knowingly.

"Frankly, we do not know how to handle the situation. We do hate to lose the business, but there is nothing that we can put together that will come up with the right answer and leave us with clean slates, all of which we regret exceedingly" (Pet. Ex. 30, R. 121-22).⁴

Phipps also wrote to Canada Foods, sought documentation as to the price arrangements with other brokers, and knowledgeably advised:

"The Robinson-Patman Act prohibits remittance of brokerage to the buyer and they are always looking for some publicity with larger con-

⁴ With respect to the "feather in somebody's cap," Phipps, who appeared as main witness for the FTC, stated later that "I know that if it was found out by any member of the National Brokerage Association that wanted to have a gripe, why, it could be anybody" (R. 44).

cerns. * * * We had hoped to do a great big business with you folks, but on the basis of what has happened on this deal, we feel that our hands are more-or-less tied, because it has not been our custom to work with unclean hands" (Pet. Ex. 31, R. 122).

By contrast with Phipps, the transaction was viewed by all participants as an open and normal competitive price adjustment:

The buyer wanted to buy an economical large quantity, and saw "no reason why" he should pay 5 cents more than the \$1.25 available from other sources (R. 53, 56). He had "no knowledge" of and was "not concerned" with the private arrangements between seller and broker, and at all times viewed the transaction in terms of "price and not of brokerage" (R. 54).⁵

From the seller's viewpoint, the 4% price reduction from \$1.30 to \$1.25 per gallon was entirely profitable. As seen by Canada Foods, large orders permitted cost economies in "containers, freight, duty and shipping," as well as processing (R. 131-133), whereas one "cannot save anything on a small order" (R. 132). In addition, the seller has "to compete with European competitors, sometimes the brokers call me and say I can get a big order if he can compete with the European competitors and sometimes United States competitors" (R. 131)—as reflected in the broker's call relating to the competitive offers surrounding the Smucker transaction (R. 79-80).

⁵ There is nothing in the record to indicate whether Smucker was in competition with any of the seller's customers who paid different prices for apple concentrate, or to what extent, if any, the 4 per cent. price reduction to Smucker in 1954 could possibly affect their competitive position in the food processing industry within the meaning of the Robinson-Patman Act.

Finally, respondent, as broker, did not lose on the transaction, despite the smaller commission rate which ultimately materialized. Admittedly "Smucker's purchase of 500 barrels was an unusually large sale, far greater than" anticipated, since originally Broch's projected sales on behalf of Canada Foods for an entire year to all customers were estimated at 1000 barrels, with sales to any one account not exceeding 50 or 100 drums (FTC Br. p. 24 n. 7). By accepting a 3% commission rate, respondent thus closed a large sale which otherwise could have been entirely lost, at a greater *total* commission than a smaller sale would have brought at a higher commission *rate* (R. 81). Basically, so far as the broker was concerned, the Smucker transaction produced "a very large order, and it is much cheaper in our office because, in order to obtain smaller customers for the same sized order, we might have to make thirty or forty or fifty or sixty long distance calls which are very costly in time and expense, actual cash expense, and on this three per cent, we would make more" (R. 81).

The Commission Proceedings

On January 11, 1956, the Commission issued its complaint charging that respondent had violated Section 2(c) of the amended Clayton Act by having "granted and allowed" a buyer "approximately 60 percent" of the brokerage commission "paid" respondent by the seller for respondent's services (R. 3). Specifically, the complaint alleged that respondent had "earned" its "normal and customary" 5% commission in the Smucker transaction, but "did not receive" it because it had "requested" the seller to lower its price to the buyer and "to recoup" for himself in part by deducting

"approximately 60 percent of the customary rate of commission or brokerage fee regularly allowed said respondents and other brokers" (R. 4).

Respondent contested the charges in all material respects. According to the answer, his brokerage commission "may vary from time to time and from sale to sale," and the anticipated 5% commission from Canada Foods "was based on contemplated sales of much smaller quantities than the sale in question" (R. 6). Asserting that the price reduction was the seller's unilateral decision, the answer detailed the seller's obvious "savings" in such a large transaction, and stressed the competitive offers available (R. 7-8). Finally, respondent emphasized the realistic business considerations behind his own willingness to take a smaller commission rate on a bigger transaction, since his return on such a deal was proportionally greater than from a number of small sales at a higher rate which required more time, effort, and expense (R. 8).

Although the key charge of the complaint was not established at the hearings, the Commission nevertheless held respondent in violation of Section 2(c) on another legal theory. The FTC Examiner's report dismissed as "immaterial" the failure of proof that respondent "requested" the seller to lower its established price to the buyer and "to recoup part of such loss" by reducing respondent's "customary" commission (R. 198). The Federal Trade Commission, adopting the Examiner's ruling, regarded it sufficient that "by acquiescence, ratification, confirmation, agreement, or otherwise" respondent received a smaller commission which was "contemporaneous with the price reduction by Canada Foods to Smucker and amounted to a shar-

ing of the price reduction by Broch and Canada Foods" (R. 209).⁶

To fit the case within the prohibition of Section 2(c) on payments of illicit brokerage commissions or allowances "in lieu thereof" by "any person" to the other "party" or that party's intermediary, the FTC ruled that "it is the office of that subsection to outlaw the diversion of brokerage to buyers, or any form of commission or sales compensation, to buyers in any manner, directly or indirectly, from any source" (R. 207). The FTC's opinion and order further theorized that respondent's acceptance of a 3% rate of commission "constitutes a payment of part of their commission to the buyer exactly as though respondents had paid two per cent of this commission to the buyer direct," and that respondent "instigated and granted payments in lieu of brokerage to the buyer Smucker" (R. 204, 209-210).

The Commission, by "Reflection upon the climate which produced the Clayton Act, as amended by the

⁶ The FTC brief portrays as quite significant its "present conclusion" that respondent and the seller "participated equally" to the tune of 50 per cent each in the lower price to the buyer (pp. 7 n. 1, 23), which apparently supersedes previous counts by the Commission of 60 per cent (Cplt., R. 4), 55 per cent (Pet. Ex. 18, R. 232), and 42 per cent (Prop. Edgs. of Staff Counsel, p. 15). There was, of course, no "customary" or "usual" 5 per cent rate for respondent (FTC Br. pp. 7 n. 1, 25), who received from 1 per cent to 5½ per cent (p. 5, *supra*). The latest FTC calculations in any event are no less spurious than the earlier numbers, by postulating a 5 per cent commission at a price of \$1.25 although no transaction at these figures did or ever could have transpired. The sole alternatives were a 5 per cent rate at \$1.30 which the buyer would not pay, and a 3 per cent rate at \$1.25 for an unforeseeably large quantity which gave the broker a proportionately greater net return than he expected in smaller transactions at 5 per cent.

Robinson-Patman Act," also stated that "the language of subsection 2(c) is so clear that it is unnecessary to resort to the reports of Congress to ascertain what was intended" (R. 207).

Respondent's contentions with respect to the seller's cost economies and competitive responses in relation to its price reduction were rejected out of hand (R. 205, 210). Without explaining why it failed to proceed conventionally here under the statutory provisions expressly governing price differentials, the Commission declared that "The complaint in this proceeding was issued under subsection 2(c), not under subsection 2(a), and the several defenses available to price discrimination charges under subsection 2(a) are not applicable to a proceeding under subsection 2(c)" (R. 210).

Finally, the Commission's opinion dismissed respondent's claim that the public interest was defeated by a proceeding rooted in a private grievance between rival brokers (R. 210), and failed to address itself to the conflict between its application of the statute to maintain broker's fees and national antitrust policies in light of this Court's *Automatic Canteen* opinion (Res. App. Br. FTC Dkt. 6484 pp. 25-27).

Accordingly, the Commission entered a cease and desist order which unconditionally prohibited respondent from paying, "directly or indirectly" to any buyer an "allowance or discount in lieu of brokerage or any part or percentage thereof,"

"by selling any food or food products to such buyer at prices reflecting a reduction from the prices at which sales of such foods are currently being effected by respondents for Canada Foods Ltd. or any other seller principal, as the case may

be, where such reduction in price is accompanied by a reduction in the regular rate of commission, brokerage or other compensation currently being paid to respondents by such seller principal for brokerage service" (R. 202, 204, 211).

The Decision Below

The Court of Appeals unanimously disapproved the Commission's theory and set its order aside.

In the court's opinion, "The most that can be said is that, because of Broch's agreement to reduce its commission, the seller was able to reduce its price. Neither in substance nor in fact, directly or indirectly, did Broch pay anything to Smucker" (R. 224). Rejecting FTC counsel's interpolation of the word "from" into the statutory text banning false brokerage payments by the seller to buyers or to their brokers, or "any allowance or discount in lieu thereof," the court declared that "Neither the language of § (2) or (c) nor its legislative history indicates that a seller's broker is covered by § 2(c). Accordingly we hold that [respondent], as seller's broker, did not violate § 2(c)" (R. 222). The court stressed that respondent was "an agent solely of the seller," that "no agent of the buyer is involved," and that here "the buyer does not suggest or even know of the reduction in the seller's brokerage commission" (R. 223).

The court also observed that the Commission ignored the public interest by having "interested itself in a private grievance between rival brokers, Tenser & Phipps and Broch" (R. 223).

The court concluded that the Commission's interpretation of Section 2(c) "would actually promote price

rigidity and uniformity contrary to the national anti-trust policy" (R. 224). As analyzed by the court,

"The effect of [the FTC] order is that the commissions of a seller's broker are rendered immune from reduction by the seller when it is negotiating for the sale of its food products, and hence such a reduction, when used as a basis for quotation of a lower price, is illegal" (R. 223).

But

"Obviously an important element in the cost of food distribution is the commission paid by sellers to their brokers. If a seller is to be forbidden to meet competition by reducing an item in its cost of distribution, then to that extent his costs are frozen without regard for the welfare of the public which must ultimately defray the resultant costs of distribution. Trade restraints in the distribution of groceries surely do not occupy a preferred anti-trust position, as distinguished from comparable situations" (R. 224).

SUMMARY OF ARGUMENT

I. Section 2(c), the so-called Brokerage Clause of the Robinson-Patman Act, does not prohibit an independent broker representing the seller from accepting a lower commission rate on a particular sale where the seller at the same time openly reduces his price to the buyer for a large lot in a competitive situation.

A. As retraced by this Court's recent *Simplicity Pattern* opinion, Congress in the Robinson-Patman Act carefully distinguished between open price reductions and discriminatory prices camouflaged by the payment of "false" brokerage commissions to the buyer side. In order to prevent evasion of the Act's basic provisions governing variations in price, Section 2(c)

bans absolutely such false brokerage payments by the seller to the buyer or to the buyer's agent, or allowances "in lieu thereof." The rationale of this "absolute" ban was to force price quotations into the open, for measurement by the statutory criteria under which price variations are lawful if they do not harm competition or can be "justified" by the seller's cost economies or "good faith" meeting of competition.

In harmony with the legislative design, the courts have uniformly limited Section 2(c) to concealed transactions which reflect illicit brokerage payments from the seller to the buyer or the buyer's agent, or substitute arrangements where "allowances or discounts" were granted "in lieu" of such *illegal* payments. Courts have rejected two other attempts to apply the "absolute" ban of the Brokerage Clause against openly quoted price reductions reflecting savings in *legitimate* commissions of the seller's broker, and have refused to outlaw them as allowances "in lieu" of brokerage within the prohibition of Section 2(c).

The Commission's novel theory of condemning as illegal *per se* an open price reduction unrelated to an *illicit* brokerage payment not only contravenes the text, history, and judicial application of Section 2(c), but does not even square with the Commission's previous position before this Court in the *Simplicity* case and the views of its own authorities which confirm that the Brokerage Clause is not a proper vehicle for outlawing those open price reductions which Congress wished to preserve under the pricing provisions of the Act.

B. Regardless of whether a lower price reflecting a reduction in a *legitimate* broker's commission may be

deemed an illicit allowance "in lieu" of brokerage as between the seller and the buyer, Section 2(c) does not penalize the acceptance of a smaller fee by the independent seller's broker as an "indirect payment" by him to the buyer via the seller's lower price.

In the first place, Section 2(c)'s text does not pertain to payments by a seller's broker—in accord with the legislative purpose that payments by the seller to buyers' agents should be scotched, while the independent seller's broker was not to be "interfered with." The prohibition of Section 2(c) on false brokerage payments by any "person" to the "other party" or the agent of the "party to such transaction other than the person by whom" such payment is made obviously equates such "persons" with "parties." It is not directed at a seller's broker who is not a "party." The legislative reports conclusively corroborate the text's specification of liability by *sellers* for *payments*, although brokers can be liable for illicit *receipts*.

Furthermore, while a broker's *receipt* of commissions then paid over to the buyer as a "rebate" to cover up a price discrimination may be reached by Section 2(c), here there was no payment of any kind by the broker in the entirely open price transaction. The FTC's esoteric theory that a broker's acceptance of a smaller commission constitutes an illicit "indirect payment" by him to the buyer is without foundation in the statute, and is refuted by the statutory text and history which confirms that a broker "can charge whatever his employer may be willing to pay."

The Commission's unprecedented attempt to penalize an independent seller's broker in an open price transaction by the "indirect payment" theory runs counter to the Robinson-Patman history in the courts

for over two decades, and entails an impermissible manipulation of the statutory text.

2. II. The Federal Trade Commission's doctrine, which admittedly promotes "price rigidity and uniformity," creates needless conflict between the Robinson-Patman Act and the antitrust laws' policy of fostering competitive prices for the benefit of the consuming public.

An "absolute" prohibition of open price reductions coupled with lower brokers' fees under Section 2(c) must inevitably operate to maintain the commissions of food brokers at artificially high levels, policed by the FTC—contrary to antitrust proscriptions which have long condemned similar arrangements as restraints of trade.

• The maintenance of brokers' fees defeats the Congressional assurances that the Robinson-Patman law was not designed to "shelter or protect brokers" or "affect legitimate brokerage," but to foster open price differentials reflecting "more economical processes." The Commission's theory obviously flouts this Court's admonitions to "reconcile" the interpretation of the Robinson-Patman Act with "the broader anti-trust policies" of Congress, and to confine strictly any "privilege restrictive of a free economy."

The FTC's rationalization for this departure by reference to "small merchants" prejudiced by an alleged "serious loophole" in favor of "large buyers" misstates the import of the decision below which leaves discriminatory exactions fully subject to the appropriate statutory provisions, and is belied by the Commission's current enforcement campaign against the very practices said to be sanctioned.

Rather, the "feather in somebody's cap" from such Section 2(c) enforcement belongs to the organized food brokers, whose fees would enjoy a privileged legal sanctuary sheltered by the Federal Trade Commission from the stresses of competition.

Paradoxically, the FTC's interpretation of the Brokerage Clause would thus benefit a special business class, at the expense of the public which must "ultimately defray the resultant costs of distribution."

ARGUMENT

I.

THE ACCEPTANCE OF A SMALLER COMMISSION RATE BY AN INDEPENDENT SELLER'S BROKER, COUPLED WITH THE SELLER'S OPEN PRICE REDUCTION, IS NOT AN ILLICIT PAYMENT "IN LIEU" OF BROKERAGE TO THE BUYER ON THE BROKER'S PART.

Part IA of our argument will show that the transaction comprised by the seller's open price reduction and the broker's acceptance of a reduced commission rate does not give rise to a *per se* illegal allowance "in lieu" of illicit brokerage under Section 2(c). Part IB will demonstrate that, irrespective of whether the lower price by the seller to the buyer constitutes a forbidden "allowance in lieu of" brokerage, the acceptance of a smaller commission by the independent seller's broker in such a transaction is not the payment of an illicit "allowance" by him to the buyer within the meaning of Section 2(c).

A. An Open Competitive Price Reduction Unrelated to An Illicit Payment of Brokerage to the Buyer Side Is Not a Forbidden Allowance "In Lieu" of Brokerage.

As confirmed by this Court's analysis in the recent *Simplicity Pattern* opinion, Section 2(c) was designed to prevent evasions of the basic statutory prohibition

on price discrimination by means of subterfuge arrangements. The statute permits variations in price unless they are detrimental to competition, and unless they cannot be "justified" by the seller's cost economies or good faith efforts to meet competition. Sections 2(a)(b)(f), 15 U.S.C. § 13(a)(b)(f). By contrast, Section 2(c)'s prohibition on "false" brokerage payments to buyers or their intermediaries, once a favorite camouflage for price discriminations, was made "absolute"—in order to flush price variations into the open for scrutiny under the basic statutory prohibitions which sift the forbidden monopolistic discriminations from beneficial competitive price reductions.

As detailed below, the FTC's novel theory perverts the statutory plan by treating a competitive open price transaction as a *per se* illegal allowance "in lieu" of brokerage, departs from every judicial ruling in point, and contradicts the Congressional understanding and the Commission's representations in the *Simplicity* case.

(1) The Legislative Design of Section 2(c) Was to Strike at Concealed Price Variations by Sellers in the Guise of Brokerage Payments.

As originally enacted, the Clayton Act of 1914 contained a disabling flaw. Because Section 2 prohibited only discriminations in *price* detrimental to competition, 38 Stat. 730 (1914), the Federal Trade Commission's Report on the Chain Store Investigation in 1934 concluded that the law was being circumvented by A&P and other chains which exacted discriminatory concessions in the form of false "dummy" brokerage

payments or "bogus" advertising allowances "not appearing on the face of the invoice."⁷

The prime concern of the so-called Brokerage Clause of the Robinson-Patman amendments to the Clayton Act in 1936 was to catch such evasion and subterfuge for price differentiation. Senator Logan, Chairman of the Subcommittee of the Senate Judiciary Committee considering the bill, thus explained to the Senate:

"The broker has a field all his own and he should not be interfered with. In order to evade the provisions of the Clayton Act, however, it was found that while direct price discrimination could not be indulged in, the buyer, if he were sufficiently powerful, could designate someone and say, 'That is my broker.' Perhaps it was a clerk in his office. Perhaps it was a manager of a store. Perhaps it was a subsidiary corporation organized for the purpose. However, the buyer would say to the seller, 'You must sell through that man, and you must pay him a certain percentage or amount of brokerage'; and when the so-called broker or dummy broker received what was paid him, he turned it over to the buyer, and in that way a price discrimination was brought about.

"I undertake to say in this august body that there is not a Member of the Senate, there is not a Member of the House, who will not at once condemn a practice of that kind, which provides secret re-

⁷ See Federal Trade Commission, Report on the Chain Store Investigation 57-59 (1934). This aspect of the FTC Report was incorporated into the hearings on the Patman bill in 1935. Hearings before the House Judiciary Committee on Bills to Amend the Clayton Act, 74th Cong., 1st Sess. 204 (1935) (hereinafter cited as Patman bill hearings).

bates under the guise of brokerage." 80 Cong. Rec. 6281 (1936) (pp. 11a-12a, *infra*).⁸

The text of Section 2(c) was framed to scotch such subterfuge arrangements. The original Brokerage Clause in the Robinson and Patman bills was directed solely at outright commission payments by sellers to buyers' fronts, without reaching such payments direct to the buyers themselves. To cover also such illicit payments or their equivalent to buyers, the Senate added to the original prohibition on false brokerage payments to buyers' fronts the phrases "or any allowance or discount in lieu thereof," and "either to the other party to such transaction [or his intermediary]."

With this revision, the Senate Judiciary Committee explained, the Brokerage Clause barred "the practice of certain large buyers to demand the allowance of brokerage direct to them upon their purchases, or its payment to an employee, agent, or corporate subsidiary whom they set up in the guise of a broker, and through whom they demand that sales to them be made." S. Rep. No. 1502, 74th Cong., 2d Sess. 7 (1936) (see pp. 2a-3a, *infra*).⁹

⁸ The identical vice was depicted in the legal analysis of Mr. H. B. Teegarden, Counsel of the U. S. Wholesale Grocers Association, who was presented to the House Judiciary Committee by Rep. Patman as the draftsman of the Patman bill and the expert as to its meaning. Patman bill Hearings, pp. 9, 27-28, 258 (p. 14a, *infra*). In analyzing the Patman bill for the House Judiciary Committee, Mr. Teegarden explained its concern with "dummy-brokerage allowances" and "pseudo-advertising allowances" because these were "favorite disguises under which large buyers wring their exactions." Patman bill Hearings, pp. 16, 31 (p. 14a, *infra*).

⁹ Cf. Section 2(b), H. R. 8442 and S. 3154, 74th Cong. (1935), Patman bill Hearings, p. 1. The pertinent clause was drafted in terms of "persons" and "parties," rather than specifically

(2) The Courts Universally Apply the Brokerage Clause to Concealed Discriminations, and Bar Its Application to Open Price Reductions Without Subterfuge.

Quite recently, this Court's *Simplicity Pattern* opinion retraced the legislative design of the Robinson-Patman Act to separate open prices, which are lawful unless inimical to competition and not legally "justified," from those discriminatory transactions camouflaged as brokerage arrangements which are unconditionally banned by Section 2(c). *Federal Trade Commission v. Simplicity Pattern Co.*, 360 U.S. 55 (1959).

This Court's opinion carefully compared the scope of the Act's price discrimination provision, "which is hedged with qualifications," with the "absolute" proscriptions of the subsections under which "false brokerage allowances and the paying for or furnishing of nonproportional services or facilities were banned outright." *Id.* at 64-67. The Court noted the "continual references" in the Congressional history of the Robinson-Patman Act to the "false brokerage" practices outlawed by Section 2(c) as "secret" discriminations which created "competitive advantages" for their recipients in "ways other than direct price concessions." *Id.* at 68 n. 12, 69.

In accord with the *Simplicity* opinion's premise that open price reductions were not the province

addressed to buyers or sellers, in order to reach also a dummy brokerage payment by the buyer to the seller's intermediary. See Mr. Teegarden's explanation, Patman bill Hearings, p. 218 (p. 16a, *infra*).

The repeated assertions that "dummy brokerage" was only one "among" several targets of the purported "broad prohibition" of Section 2(c) (FTC Br. pp. 8, 10, 19 n. 5, cf. 9, 16, 17, 18, 20), confuses the diverse aims of the several subsections of the *entire bill* with the particular and specific goal of Section 2(c) as detailed by the legislative history reprinted at pp. 1a-18a, *infra*.

of the Brokerage Clause, concealment and subterfuge have been the key elements in the courts' application of Section 2(c). For "the gist of the violation under Section 2(c) is not that discriminatory prices have been charged, but that the parties have engaged in a practice designed to deceive others as to the price charged and paid, whether or not discriminatory." *Federal Trade Commission v. Washington Fish & Oyster Co.*, 1959 CCH Trade Cases par. 69,487, at p. 75,919 (9th Cir. Oct. 12, 1959).

Thus, in the bellwether *Biddle* decision, the Second Circuit in 1938 hit the statute's original target of brokerage commissions paid by sellers to a buyer's purchasing organization, and declared:

"If a price discount is given as a brokerage payment to a controlled intermediary, it may be and often is concealed from other customers of the seller. One of the main objectives of section 2(c) was to force price discriminations out into the open where they would be subject to the scrutiny of those interested, particularly competing buyers." *Biddle Purchasing Co. v. Federal Trade Commission*, 96 F. 2d 687, 692 (2d Cir. 1938), *cert. denied*, 305 U.S. 634 (1938).¹⁰

The Fourth Circuit in two cases similarly viewed Section 2(c) as aimed at the "concealed advantage" secured by "the buyer who receives the brokerage allowed his purchasing agent."¹¹

¹⁰ This rationale has been reiterated by the several appellate decisions which banned the acceptance of brokerage commissions from sellers by buyers' intermediaries. See cases collected at note 31, *infra*.

¹¹ *Oliver Bros., Inc. v. Federal Trade Commission*, 102 F. 2d 763, 771 (4th Cir. 1939); *Southgate Brokerage Co. v. Federal Trade Commission*, 150 F. 2d 607, 611 (4th Cir. 1945), *cert. denied*, 326 U.S. 774 (1945).

The further ban of the statute on any "allowance or discount in lieu" of such an illicit brokerage payment to the buyer side was illuminated by the A&P case in the early years of the Act. Prior to the Robinson-Patman amendments, A&P had pocketed brokerage commissions from sellers through ostensibly independent "field buying agents," which were actually in A&P's employ and secretly passed back the brokerage commissions they collected. 26 F.T.C. 486, 495 (1938).¹² Instead of such false brokerage payments, A&P's buyers thereafter secured quantity discounts providing for equivalent rebates; and so-called "net prices" reflecting deductions in the amount of the former spurious brokerage commissions. *Id.* at 495-496.

In a landmark ruling affirmed by the Third Circuit, these receipts were outlawed because they represented "an amount equal to the brokerage which but for the Robinson-Patman Act said sellers would have paid" to A&P's field buying agents; were "passed on by the sellers and accepted by the respondent to take the place of, and in substitution for, brokerage paid to the respondent's field buying agents prior to that date"; and accordingly "were allowances and discounts in lieu of brokerage and were affirmatively intended as such by both sellers and the respondent." *Id.* at 496, 501.¹³

¹² In 1934, the Second Circuit also prohibited A&P under the Packers and Stockyards Act from the "unfair, discriminatory, and deceptive" practice of setting up a former employee who masqueraded as an independent provision broker, but acted as a "dummy" for A&P to which he turned over his commissions minus expenses. *Tranz Pork Stores, Inc. v. Wallace*, 70 F. 2d 688 (2d Cir. 1934).

¹³ The Commission found, moreover, that A&P's discriminatory exactions were severely harmful to competition on both the seller and the retail distribution level. *Id.* at 499.

On review, the Court of Appeals condemned these "devices" by A&P as conceived "in attempted avoidance of the provisions of the Robinson-Patman Act," 106 F. 2d 667, 672, 675 (3d Cir. 1939), *cert. denied*, 308 U.S. 625 (1940).¹⁴

The A&P case thus epitomizes the statutory prohibition on substitute allowances or discounts to a buyer "in lieu" of *illicit* brokerage payments, which was added by the Senate Judiciary Committee (p. 22, *supra*) to "prevent evasion of the restriction through a mere modification of the form of the sale contract. It was assumed that large buyers would seek to convert the brokerage which they had hitherto received into an outright price reduction."¹⁵

¹⁴ It was not contested that these payments to A&P were made and received "in lieu" of the illicit brokerage commissions previously paid to A&P's fronts, so the court had no occasion to elaborate on that statutory phrase. Conceding it had obtained "allowances or discounts in lieu of" brokerage, A&P asserted unsuccessfully that these were nevertheless lawful because of "services rendered" by A&P to the sellers. See Brief for A&P, pp. 13, 19; Brief for FTC, p. 11; Reply Brief for A&P, pp. 11-12.

In view of A&P's conceded allowances "in lieu of" false brokerage fees, the A&P decision properly held also that the cost proviso of Section 2(a) could not be read into a case if properly within Section 2(c). 106 F. 2d 667, 677 (3d Cir. 1939). But here the Commission (R. 210) turns A&P upside down by urging that an open price differential related to reductions in *legitimate* commissions *thereby* becomes an allowance "in lieu" of illicit brokerage flatly prohibited by Section 2(c) regardless of cost economies or other legal justification. See Note, The Brokerage Provision of the Robinson-Patman Act, 47 Yale L.J. 1207, 1210-12 (1938).

¹⁵ Zorn & Feldman, *Business Under the New Price Laws* 219 (Prentice-Hall 1937). This object of the "in lieu" phrase is corroborated in an *ante litem motam* analysis by a FTC official last year. Seidman, *Some Aspects of the Law Concerning Price*

But no court in two decades of the Robinson-Patman Act has prohibited an open price coupled solely with a reduction in a *legitimate* broker's fee as an illicit allowance "in lieu" of brokerage—as illustrated by two recent decisions in point.¹⁶ In both cases, a seller of plastic cups had terminated the services of his sales agent, thereby eliminating his commission, and sold a large lot directly to the buyer at a reduced price reflecting these commission savings. Two independent decisions by separate district courts dismissed the suit of the discharged sales agent asserting that the lower price was an absolutely illegal discount or allowance by the seller to the buyer "in lieu" of brokerage under Section 2(c).

ing, in *Competitive Pricing* 59, 63 (A.M.A. Management Report No. 17, 1958).

The Fourth Circuit also viewed the *A&P* case as "involving an allowance of brokerage made directly to the buyer because of alleged services rendered the seller by the buyer's purchasing agents." *Southgate Brokerage Co. v. Federal Trade Commission*, 150 F. 2d 607, 610 (4th Cir. 1945), cert. denied, 326 U.S. 774 (1945). Cf. *Robinson v. Stanley Home Products, Inc.*, 174 F. Supp. 414, 417 (D. N.J. 1959).

¹⁶ *Southgate Brokerage*, cited by the Commission in addition to the *A&P* case (Br. p. 25 n. 8), concerned a buyer who also functioned as a broker on the side, and received brokerage commissions either by separate check from the seller, or made a deduction from the seller's invoice price and remitted the lesser amount. 150 F. 2d at 608. See also the commercial bribery cases collected at note 32, *infra*, such as *Freedman v. Philadelphia Terminals Auction Co.*, 145 F. Supp. 820 (E.D. Pa. 1956), cited by the FTC (Br. p. 16).

In the *Washington Fish & Oyster* case, p. 24, *supra*, the court refused to reopen an old FTC order, and viewed the instant decision below as resting on the premise that "a seller reduced the fee to be paid to his broker for bona fide brokerage services in order to quote a competitive over-all price to a buyer," whereas there a commission was "paid to the buyer."

The District Court for New Jersey, dismissing the case against the seller, emphasized that the Act did not curtail the right of a seller to lower its prices by dispensing with the legitimate fees of its own broker. *Robinson v. Stanley Home Products, Inc.*, 174 F. Supp. 414, 417-18 (D. N.J. 1959).

The District Court for Massachusetts, rejecting the case against the buyer, declared that "the reduction or elimination of a commission or brokerage fee payable by the seller to its own agent to enable the seller to sell at a lower price is not forbidden" by the Brokerage Clause. *Robinson v. Stanley Home Products, Inc.*, 1959 CCH Trade Cases par. 69,501, at p. 75,974 (D. Mass., March 18, 1959).

(3) The Text and Purpose of Section 2(c) Contradict the FTC's Novel Characterization of an Open Price Reduction, Related to a Legitimate Broker's Fee, as an Illicit Brokerage Payment.

The FTC's challenge to an open price reduction as a concealed brokerage payment not only advocates an upside-down perspective of the Act contrary to the judicial consensus, but directly contravenes the text and purpose of Section 2(c)'s ban on any "discount or allowance in lieu" of an illicit brokerage payment.

According to the FTC brief, "If a seller dispensed with his broker's services in making a particular sale, and then openly reduced the selling price by the exact amount of brokerage involved, this would constitute an allowance 'in lieu of brokerage' by the seller to the buyer in violation of 2(c)" (Br. p. 27). Codifying this premise, the Commission's order unconditionally prohibits, as an "allowance or discount in lieu of brokerage," any "reduction in price * * * accompanied by a reduction in the regular rate of commission,

brokerage or other compensation currently being paid" to a broker by his seller principal (R. 202, 204).

Moreover, such illegality would attach irrespective of any competitive effects; regardless of the seller's necessities of reducing his price in good faith to meet a competitor's equally low price as permitted by Section 2(b); notwithstanding the seller's savings in an economical transaction which can "cost-justify" a lower price under Section 2(a); and despite the understanding of the transaction by all parties in terms of price rather than brokerage (see pp. 9-10, *supra*).¹⁷

But as established by the legislative history, illustrated by the *AdP* case, and confirmed by the two recent district court decisions, the absolute prohibition of Section 2(c) strikes at allowances "in lieu" of *illicit*, not legitimate, brokerage payments. As broadened by the Senate Judiciary Committee, the detailed text of Section 2(c) proscribes "any allowance or discount in lieu" of the forbidden payment of "anything of value

¹⁷ The suggestion that the FTC ruling at bar concerns special "facts" in a "particular case" which are impervious to judicial review (Br. pp. 22, 25 n. 8) is refuted by the FTC's treatment of all pertinent issues as "legal questions" and "legal issues" (R. 190, 206), as did the court below (FTC Br. p. 8 n. 2). The FTC's *Main Fish* ruling (Br. p. 25 n. 8) discusses whether a particular price reduction was causally related to or "in lieu" of a particular brokerage commission, but is irrelevant to the dispositive statutory consideration that Section 2(c) proscribes no lower prices "in lieu" of *legitimate* brokerage payments.

Indeed, if the Commission has correctly labeled the controversy here as a *factual* question, this alone would require affirmance of the judgment below pursuant to this Court's "usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations." *Federal Trade Commission v. American Tobacco Co.*, 274 U.S. 543, 544 (1927); *Federal Trade Commission v. Standard Oil Co.*, 355 U.S. 396, 400 (1958).

as a commission, brokerage, or other compensation * * * to the other party" or that other party's "agent, representative or other intermediary * * *" (See text at p. 4, *supra*). Section 2(c) manifestly does not undertake to outlaw open price reductions "in lieu" of legitimate commission payments by a seller to his *own* broker for services rendered.¹⁸

Actually, Senator Logan, the Chairman of the Subcommittee studying the bill and its Senate manager, gave precise assurances that "you can deduct legitimate brokerage. This sham brokerage is what this bill is aimed at. It is perfectly proper under this bill to pay and deduct legitimate brokerage."¹⁹ Representative Patman avowed that the bill "will in no way shelter or protect brokers," and "Sales may be made directly from a manufacturer to the retailer or to con-

¹⁸ The FTC brief would escape measurement of the Commission's legal theory of an "allowance in lieu of" brokerage (p. 12, *supra*) against the words of Section 2(c)—simply commencing to "use the word 'brokerage' to refer to the payment of brokerage or an allowance in lieu thereof" (Br. p. 14 n. 3).

Such convenient abbreviations must not fog up the statutory text and legislative intent. The brief's textual elision would throw the entire Act askew, since Section 2(c) also covers any "commission" or "other compensation" apart from "brokerage." Hence the brief's device not only could absolutely outlaw under Section 2(c) an "allowance or discount" entirely legal under Section 2(a) or (f), but would also jeopardize a "payment" of "compensation" on "proportionally equal terms," as permitted by Section 2(d), 15 U.S.C. § 13(d), since the "services rendered" exception in the Brokerage Clause does not protect buyers' services to sellers. See cases cited note 31, *infra*.

¹⁹ Senator Logan's statement was made in comparing the Robinson-Patman bills with alternate criminal proposals which were subsequently appended as Section 3 of the Robinson-Patman Act, 15 U.S.C. § 13a. Hearings before a Subcommittee of the Senate Judiciary Committee on S. 4171, 74th Cong., 2d Sess. 53 (1936).

sumers." *Id.* at 7760, 7886.²⁰ Also, the Senate/House Conference Committee expressly deleted a proposed proviso which could have prevented savings in legitimate brokers' fees from supplying "cost-justification" for a seller's lower price.²¹ Representative Utterback, Chairman of the Conferees, explained to the House that "there is nothing in the bill that requires the employment of a broker; there is nothing to prevent sales direct from seller to buyer," *id.* at 9418, and

"There is no limit to the phases of production, sale, and distribution in which such improvements may be devised and the economies of superior efficiency achieved, nor from which those economies, when demonstrated, may be expressed in price differentials in favor of the particular cus-

²⁰ Mr. Teegarden, the Patman bill's draftsman, also assured the House Judiciary Committee that it "leaves anyone free to select his broker or dispense with his services as he sees fit." Patman bill Hearings, p. 217 (pp. 15a-16a, *infra*).

²¹ As Senator Logan explained to the Senate, "In the second section of the committee amendment there is a provision that in making discriminations or differentials, or whatever we may choose to call them, all costs other than brokerage shall be allowed; and it has been said that the words 'other than brokerage' in that section ought to go out.

"I have thought a good deal about that suggestion. I think perhaps legitimate brokerage ought to be allowed as part of the costs; and I think when the bill was drafted—I did not write the bill—perhaps in the amendment which was inserted by the Judiciary Committee of the Senate we had in mind dummy brokerage, sham brokerage. It may be that something should be done about that." 80 Cong. Rec. 6285 (1936). That exception was then deleted by the Conference Committee, confining the prohibitions on brokerage within the four corners of the Brokerage Clause. *Id.* at 9414.

tomers whose distinctive methods of purchase and delivery make them possible." *Id.* at 9417.²²

By now asserting that brokerage fees *must not* be reduced regardless of the seller's competitive price variation, the Commission not only defeats the Congressional guarantees, but adopts the very excrescences of the Brokerage Clause which were decried by Senator Logan two decades ago as among the "rather fantastic ideas advanced" to discredit the legislation.²³

The theory of Section 2(c) now advocated by the Commission cannot even square with its own previous professions. This Court's *Simplicity* opinion, stressing the difference between the "absolute" ban on concealed price discriminations through "secret" and "false brokerage allowances," on the one hand, and the flexible provisions governing open price variations, on the other, drew on this affirmation in the Commission's *Simplicity* brief:

"Paying brokerage to the buyer, or furnishing to him facilities not accorded in like measure to all other buyers, is discrimination cloaked as a legitimate business transaction. Congress denominated practices of this kind as 'abuses', and accordingly outlawed them. The outright prohibitions were designed to bring variance in treatment of differ-

²² Several examples, including savings as between "traveling-salesmen solicitation" and direct selling, were cited as "illustrative of the way in which the bill permits the translation of differences in costs into price differentials as between the customers concerned, no matter where those differences arise." *Id.* at 9417. Nevertheless, a recent Commission complaint, building on its doctrine here, has attacked a seller's price reductions related to reduced salesmen's commissions, as *per se* illegal allowances "in lieu of" commissions. *Thomasville Chair Co.*, Dkt. 7273 (Oct. 7, 1958).

²³ Hearings, *supra* note 19, at 54. See also Logan statement, 80 Cong. Rec. 3118 (1936).

ent purchasers into the open, as price differentials, which could be proceeded against, if at all, under the carefully framed provisos and limitations of §2(a)." (FTC Br. p. 23).

Confronted here with a price variation brought "into the open," Commission counsel turn their advocacy inside out and reverse their field. Now the theory is:

"Nor did Congress intend that the only method for dealing with open price discriminations, accomplished through brokerage, is by proceeding against the seller for violating the price-discrimination prohibitions of Section 2(a)" (FTC Br. pp. 13, 27).

But as recently observed by the *Robinson* decision, in line with this Court's *Simplicity* rationale,

"The evil aimed at by Section [2(c)] was the evasion of the ban on price discrimination by using the payment of so-called brokerage fees or commissions by the seller directly or indirectly to the buyer as a mask for what was really a reduction in price. Here where the price was allegedly reduced, plaintiff tries to reverse the argument by contending that a price reduction should be considered the payment of an illegal commission." *Robinson v. Stanley Home Products, Inc.*, 1959 CCH Trade Cases par. 69,501, at p. 75,974 (D. Mass., March 18, 1959).

The FTC's verbal somersault lacks any visible means of legal support even from the Commission's own reference sources (Br. p. 21). A recent Patman Committee Report to Congress on price discrimination and the Robinson-Patman Act declared:

"False brokerage qua brokerage is absolutely forbidden. False brokerage qua 'a naked quotation in price' does not fall into the 'masquerade' cate-

gory; rather it falls into the trap deliberately set for it by the law. Discriminatory concessions which cannot disguise themselves as brokerage or 'allowances' are thus forced to show their true character, and to be measured by the sections of the law dealing with discrimination." H.R. Rep. No. 2966, 84th Cong., 2d Sess. 97-98 (1956).

And according to the analysis of the Commission's prime legal authority (Br. p. 21):

"We do not believe that the purpose of Section 2(c) was to give independent brokers a preferred status, or to prohibit true price differentials allowable under Section 2(a) and arrived at in the open and normal course of the seller's business. * * * If the objective of 2(c) was to bring price discriminations into the open, then when they are brought into the open the validity of the differentials should be tested under 2(a)." Austin, *Discrimination in Practices*, in *How to Comply with the Antitrust Laws* 174, 179-80 (CCH 1954); *Price Discrimination and Related Problems under the Robinson-Patman Act* 115 (A.L.I. 2d Rev. ed. 1959).

What the Commission has done, in sum, is to treat an open price reduction coupled with a reduced *legitimate* broker's fee as an unconditionally prohibited allowance in "lieu of" false brokerage, so as to condemn under Section 2(c) an open price transaction which Congress sought to preserve under Section 2(a).

B. The Broker's Receipt of a Reduced Commission Is Not An "Indirect" Payment of An Illicit Allowance "In Lieu" of Brokerage to the Buyer.

Apart from the fact that a seller's open competitive price reduction coupled with a smaller broker's fee is not an allowance "in lieu" of illicit brokerage, which

alone requires affirmance of the judgment below, the Commission's theories *vis a vis* the independent seller's broker participating in such a transaction are *a fortiori* invalid on additional grounds.

This part of our argument develops that Section 2(c), as corroborated by its legislative history and judicial interpretation, applies specifically to illicit brokerage commission payments *by* the seller, the one principal party, *to* the buyer, the other principal party, *or to* the buyer's intermediary in a sales transaction. While the Brokerage Clause reaches illicit *receipts* by brokers, it does not undertake to regulate *payments* on the part of brokers. In any event, there is no statutory foundation for the esoteric doctrine that acceptance of a smaller fee by the seller's broker is *pro tanto* an "indirect payment" of the difference by the broker to the buyer, via the seller's lower price. The Commission's novel theory is not only incompatible with two decades of judicial interpretation of the Robinson-Patman Act, but entails an inadmissible manipulation of Section 2(c)'s text.

(1) The Brokerage Clause Does Not Penalize Independent Brokers Acting Solely for the Seller.

The text and history of Section 2(c) establish its aim to prevent false brokerage payments by one party to the other party directly or through that other party's agent, *i.e.*; payments by the seller to the buyer or to the buyer's agent, and enacts no liability for the independent seller's broker who is not a party to the sales transaction.²⁴

²⁴ A seller could, of course, be liable under 2(c) for staging a false brokerage payment to the buyer by a broker or anyone else for whose actions he was responsible. Cf. *Oliver Bros., Inc. v. Federal Trade Commission*, 102 F. 2d 763, 770 (4th Cir. 1939).

As restated by the bellwether judicial interpretation of Section 2(c) in 1938, "It is clear that the statute prohibits payment of brokerage [1] by the seller [2] to the buyer [3] or *his* agent or representative or controlled intermediary except for services rendered." *Biddle Purchasing Co. v. Federal Trade Commission*, 96 F. 2d 687, 691 (2d Cir. 1938), *cert. denied*, 305 U. S. 634 (1938). And Senator Logan, floor manager of the bill, assured the Senate in 1936 that "It is not aimed at the legitimate practice of brokerage, because brokerage is necessary. The broker has a field all his own and should not be interfered with." 80 Cong. Rec. 6281 (1936). See also *id.* at 3114, 3118, 7886.

Simply put, Section 2(c) (see text at p. 4, *supra*) strikes at illicit brokerage payments *by* "any person" *to* the "other party" or to an intermediary acting for the "party" "other than the person" who makes the payment. When the "limiting clause" containing the word "other" is applied to its "last antecedent," these "persons" who may not make false payments are manifestly equated with "parties." Cf. *Federal Trade Commission v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959). For a "person" paying something to the "other party" must likewise be a "party," and the intermediary acting for the "person" "other than the party" by whom he is paid must be acting for a "party," too.²⁵ The

²⁵ For example, a "person" charged under a statute of the United States with attacking either *another* American or the wife of the *American other than* the "person" committing the crime must perforce be an American himself. To paraphrase Mr. Justice Holmes, "Words having universal scope . . . will be taken, as a matter of course, to mean only everyone subject to such legislation, not all that the [Commission] subsequently may be able to catch." *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909). Cf. also *United States v. Jin Fuy Moy*, 241 U.S. 394, 402 (1916); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 287 (1949); *Aper Hosiery Co. v. Leader*, 310 U.S. 469, 486, 489 (1940).

equation of "persons" and "parties" in Section 2(c), moreover, is in harmony with the framework of the entire Act.²⁶

Since a seller's broker does not function as a "party," he is not comprehended by this prohibition on a "person" making payments. Rather, as heretofore universally understood, Section 2(c) prohibits a seller's payment of false brokerage to the buyer or to the buyer's agent, and holds liable the payors as well as the recipients of such a payment.²⁷ While a broker

²⁶ The numerous prohibitions on "persons" in other provisions relating to discriminations invariably denote selling or buying principals in business dealings. *I.e.*, Section 2(a) and (b) (sellers); 2(c) (sellers and buyers); 2(d) and (e) (sellers); 2(f) (buyers). Whenever liability goes beyond the buyer or seller "parties," as in those specific dummy transactions covered by Section 2(c), the statutory text says so in so many words. Thus, Section 3 of the Robinson-Patman Act makes it illegal for any "person" to "be a party to, or assist in" forbidden transactions. 15 U.S.C. § 13a.

The Commission's contrary assertion (Br. p. 14 n. 4) is not documented with any case. Actually, intermediaries have been affirmatively *excluded* by the Commission from proceedings concerning discriminatory promotional practices. *P. Lorillard Co.* and others, Dkts. 6592 *et seq.* (interventions denied, Oct. 2-3, 1956), *aff'd on other grounds*, 267 F. 2d 439 (3d Cir. 1959).

²⁷ One FTC official last year also advised, "Section 2(c) of the Robinson-Patman Act is a fairly simple provision which, for all practical purposes, says that *the seller may not pay* to the buyer, the buyer's agent, or anybody acting for or in behalf of the buyer, or under his control, a brokerage fee or commission, or a discount in lieu thereof, in connection with the buyer's own purchases." Siedman, *supra* note 15, at 63. To the same effect, see Austin, Price Discrimination and Related Problems Under the Robinson-Patman Act 105 (A.L.I. 2d Rev. ed. 1959); Oppenheim, Selected Antitrust Developments in the Courts and the Federal Trade Commission During the Past Year, 15 A.B.A. Antitrust Section Proceedings 37, 69 (1959). The FTC brief's citation of Oppenheim and Austin as supporting authorities (p. 21) is rather cheerful in view of their criticism of the Commission's basic theory. Oppenheim, *id.* at 68-69; Austin, *supra*, at 115.

thus may be liable for *receiving* illegal payments from the seller, there is no penalty in the text for *paying* on the part of brokers.

Had Congress sought to place a broker acting solely for the seller on the same legal footing as the suspect buyer's dummy or agent, it strains credulity that the verbose text of the Brokerage Clause lacks the one word saying so (cf. R. 222).

Rather, the legislative reports corroborate Senator Logan's assurances that the independent broker who represents the seller "should not be interfered with." 80 Cong. Rec. 6281 (1936). The House Judiciary Committee and the Senate/House Conferees explained Section 2(c)'s ban on false brokerage payments in identical words:

"It prohibits its allowance *by the buyer* direct to the seller, or *by the seller* direct to the buyer; and it prohibits its payment *by either* to an agent or intermediary acting in fact for or in behalf, or subject to the direct or indirect control, of the other." H. R. Rep. 2287, 74th Cong., 2d Sess. 15 (1936); H. R. Rep. No. 2951, 74th Cong., 2d Sess. 7 (1936) (see pp. 1a-4a, *infra*).

That universal understanding was reconfirmed in the debates. Senator Logan advised that the provision "forbids the payment or allowance of brokerage either to the *other principal party*, or [its] intermediary," 80 Cong. Rec. 3114 (1936); and provides that "no buyer shall engage in this trick brokerage practice whereby a rebate may be made *by the seller*." *Id.* at 6282. Representative Patman assured the House that the bill would "prohibit *one party* from bribing the *representative of the other* under the guise of brokerage allowances or commissions." *Id.* at 7760.

Representative Utterback, the Chairman of the Senate/House Conferees, carefully explained the text of the Brokerage Clause immediately preceding enactment:

“[I]t prohibits the payment or allowance of commissions or brokerage on the purchase or sale of goods either to the other party to the transaction or to an intermediary who is acting in fact for or under the control of the other party to the transaction; that is, the party other than the one who pays the commission or brokerage in question. * * * [I]f an intermediary is employed, and is in fact acting for or under the control of the buyer, then the *seller cannot* pay him. Or if he is acting for or under the control of the seller, then *the buyer cannot* pay him. And where sales are made from buyer to seller, in the nature of the case no brokerage services are rendered by either, and no payment or allowance on account thereof can be made by *either party to the other.*” *Id.* at 9418.

If Congress in Section 2(e), notwithstanding its text, nevertheless set out to penalize an independent seller's broker not acting for the buyer side, its failure to reveal any trace of that purpose in the voluminous hearings and debates is beyond belief.²⁸

²⁸ See legislative history collected at pp. 1a-18a, *infra*. The Commission's concession that its “particular application may not have been contemplated by the legislators” (FTC Br. p. 20) is surely an understatement. Its brief nowhere refutes these conclusive expressions of legislative intent, and the single-cropped colloquy quoted for a “broadly” framed prohibition on brokerage payments “regardless of the mode,” *i.e.*, that “*The bill prohibits the act and that prohibition would extend alike to all that are affected by it*” (Br. pp. 18-19) (italics in brief), omits the immediately following exchange: “Mr. George. Both to the giver and to the taker, of course? Mr. Logan. Yes; that is true.” 80 Cong. Rec. 3115 (1936). See full legislative history pp. 1a-18a, *infra*; cf. *AdP* opinion, 106 F. 2d at 676-677.

(2) No Foundation Exists for the Concept of "Indirect" Payments by a Broker Via the Acceptance of a Smaller Commission in an Open Price Transaction.

There is no statutory foundation for the FTC's "indirect payment" theory—the esoteric concept of the acceptance of a smaller commission as *pro tanto* a brokerage "payment" of an "indirect" nature by the broker to the unwitting buyer via a price reduction by the seller (R. 204, 208-209). On the contrary, Senator Logan assured the Senate that "A legitimate broker can charge whatever his employer may be willing to pay without the violation of any provisions of the proposed act." 80 Cong. Rec. 3118 (1936) (p. 11a, *infra*).

At the outset, a broker's secret rebate payments covering up a price discrimination by the seller to the buyer have neither semblance nor relevance to the "open price" case at bar.²⁹ Here the seller's as well as the broker's invoices reflected the actual price quoted by the seller and paid by the buyer (pp. 7-8, *supra*);

²⁹ Though no court has adjudged the precise point, it has been assumed that a broker ostensibly acting for the seller may not receive a commission from the seller, and then pay the buyer a "rebate" or "kickback." As we explained below (Pet. Reply Br. p. 19), in such a case where the actual price paid is concealed by connivance or "dual representation," the broker is acting partially for the buyer and may be unlawfully receiving a commission from the seller partly in the buyer's behalf, i.e., as an "intermediary" or "agent" of the buyer within the ban of Section 2(c). *E.g.*, *Oliver Bros., Inc. v. Federal Trade Commission*, 102 F.2d 763, 770 (4th Cir. 1939); *Kentucky Rural Electrical Coop Corp. v. Moloney Electric Co.*, 175 F. Supp. 250, 254 (W.D. Ky. 1959); *The Robinson-Patman Act, Its History and Probable Meaning* 38 (Wash. Post 1936); Note, 36 Col. L. Rev. 1285, 1314 n. 157 (1936). Buyers' agents who made money payments to the buyer side were held liable by the court below for receiving commissions from the seller for the buyer. *E.g.*, *Independent Grocers Alliance Distributing Co. v. Federal Trade Commission*, 203 F.2d 941, 942-944 (7th Cir. 1953); *Modern Marketing Service, Inc. v. Federal Trade Commission*, 149 F.2d 970, 972, 974-977 (7th Cir. 1945).

the buyer had no knowledge of the broker's arrangements (p. 9, *supra*); and the Court of Appeals emphasized that "Neither in substance nor in fact, directly or indirectly, did Broch pay anything to Smucker" (R. 224). See also *Robinson v. Stanley Home Products, Inc.*, *supra*, pp. 27-28. Whatever may be the liability of brokers for *receiving* money then paid over to the other side, there was no such receipt or payment here.

Furthermore, whenever the Robinson-Patman law sought to proscribe "indirect" payments by anyone, the statutory text expressly employs that term. See, *e.g.*, the basic prohibition on a seller discriminating in price, "directly or indirectly," 15 U.S.C. § 13(a). Section 2(c) itself contains the word "indirect" to reach agents under the "direct or indirect" control of the buyer (see text, p. 4, *supra*).

The legislative history supports Senator Logan's assurance that the seller's broker "can charge whatever his employer may be willing to pay." 80 Cong. Rec. 3118 (1936). The Committee reports show that the only "indirect" brokerage payments contemplated by Section 2(c) were illicit payments *by the seller through the buyer's intermediary*, rather than by the seller to the buyer direct.

The theory of "indirect payments" by brokers whose acceptance of a smaller fee purportedly gives the buyer an illicit "allowance in lieu of" brokerage thus lacks foundation anywhere along the line.

³⁰ The FTC brief (pp. 17, 18) quotes isolated phrases in the reports, but omits the immediately following sentences which explain the above meaning of the cropped quotations. Compare the complete text of the Committee reports on the provision, pp. 1a-4a, *infra*.

(3) The Commission's Novel Interpretation of Section 2(c) Runs Counter to Two Decades of Judicial Precedent, and Entails Inadmissible Manipulation of the Statute.

In accord with the statutory text and purpose, no court to date has imposed liability under Section 2(c) on an independent broker acting solely for the seller in an open price transaction.

For two decades the decisions applying Section 2(c) have outlawed brokerage commissions paid by the seller to buyers' agents or representatives.³¹ Several other 2(c) cases condemned commercial fraud or "dual representation" by an agent surreptitiously acting also for the other side.³²

³¹ *Biddle Purchasing Co. v. Federal Trade Commission*, 96 F.2d 687 (2d Cir. 1938), cert. denied, 305 U.S. 634 (1938); *Oliver Bros., Inc. v. Federal Trade Commission*, 102 F.2d 763 (4th Cir. 1939); *Quality Bakers of America v. Federal Trade Commission*, 114 F.2d 393 (1st Cir. 1940); *Modern Marketing Service, Inc. v. Federal Trade Commission*, 149 F.2d 970 (7th Cir. 1945); *Federal Trade Commission v. Herzog*, 150 F.2d 450 (2d Cir. 1945); *Independent Grocers Alliance Distributing Co. v. Federal Trade Commission*, 203 F.2d 941 (7th Cir. 1953). These decisions also developed the principle that the exception in Section 2(c) of payments "for services rendered" did not apply to services to the seller by a buyer's representative.

The *Oliver* opinion, *supra*, cited in the FTC brief (p. 15), in fact outlawed payments by a seller to a buyer's intermediary, and nowhere alludes to liability for a seller's broker.

³² *Fitch v. Kentucky-Tennessee Light & Power Co.*, 136 F.2d 12 (6th Cir. 1943); *Freedman v. Philadelphia Terminals Auction Co.*, 145 F.Supp. 820 (E.D. Pa. 1956); *Scarr, Roebuck & Co. v. Blade*, 110 P. Supp. 96 (S.D. Calif. 1953).

As the *Ad-P* opinion also pointed out, "dual representation by agents opens a wide field for fraud and oppression. Conflicting interests are always engaged when an attempt is made by buyers and sellers to arrive at a market price for commodities. We entertain no doubt that it was the intention of Congress to prevent dual representation by agents purporting to deal on behalf of both buyer and seller." 106 F.2d at 674. The opinion continued, "For

But without a single decision going the other way, the opinions of Courts of Appeals for six other Circuits refute the major premise of the Commission's theory, and confirm the Congressional plan that buyers' agents or dummies, not independent seller's brokers and open prices, are the proper province of Section 2(c).³³

Besides their lack of support in the Act's history and interpretation to date,³⁴ the Commission's theories

this reason paragraph (c) is framed by disjunctives. The edge of the paragraph cuts two ways, prohibiting the payment or receipt of commissions, discounts or brokerage to the adversary party by the other's agent." *Ibid.* Compare FTC Br. p. 16, quoting this sentence without the preceding context.

³³ Besides the Second Circuit's *Riddle* opinion, *supra*, p. 24, see also: "The practice of paying brokerage, or sums in lieu of brokerage, to buyers or their agents ~~by~~ sellers was found by Congress to be an unfair trade practice resulting in damage to commerce. Paragraph (c) prohibits such practice." *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F.2d 667, 678 (3d Cir. 1939), *cert. denied*, 308 U.S. 625 (1940). Similarly, "the statute prohibits payment of brokerage by the seller to the buyer or his agent or representative or controlled intermediary." *Fitch v. Kentucky-Tennessee Light & Power Co.*, 136 F.2d 12, 15-16 (6th Cir. 1943). *Accord*: *Webb-Crawford Co. v. Federal Trade Commission*, 109 F.2d 268, 270 (5th Cir. 1940), *cert. denied*, 310 U.S. 638 (1940); *Quality Bakers of America v. Federal Trade Commission*, 114 F.2d 393, 398 (1st Cir. 1940); *Southgate Brokerage Co. v. Federal Trade Commission*, 150 F.2d 607, 609 (4th Cir. 1945), *cert. denied*, 326 U.S. 774 (1945).

³⁴ The prior "consistent administrative construction" by the FTC (Br. pp. 29 n. 6, 30) is composed of "kickback" charges involving actual receipts and payments of money by a broker to the other side, *e.g.*, *Custom House Packing Corp.*, 43 F. T. C. 164 (1940), or commission receipts by a "broker" who operated as a buyer on the side, *e.g.*, *W. E. Robinson & Co.*, 32 F. T. C. 370 (1941).

The brief also cites (FTC Br. pp. 20-21) a private volume published under the authorship of Mr. Patman two years after passage of the statute, whose "discussion can scarcely be termed an objective

entail an inadmissible manipulation of the statutory text.

The Commission's theory for reaching alleged payments by an independent seller's broker cannot overcome the words of Section 2(c). Its brief's theory is that "the broker is the representative of one party to the transaction (the seller), and the buyer is the 'other party' thereto" (Br. p. 14; cf. p. 19); while Congress allegedly "concluded that it was necessary broadly to ban all brokerage payments made by the seller or his agent to the buyer" (p. 20). It *might* be argued, to be sure, that the statutory prohibition on illicit payments by "any person" not only covered principal "parties" but also the seller's "representative" or "agent" by silent implication—if there were no *express* treatment of "representatives" or "agents." But Section 2(c) expressly specifies those "representatives" or "agents" meant to be covered—*i.e.*, those acting for the party other than the one by whom they are paid. (See text, p. 4, *supra*).

Simply ignoring that portion of Section 2(c),³⁵ the FTC brief instead interpolates a spurious reference to payments by the seller "or his agent" (p. 20)—which

analysis " Book Reviews, 87 U. of Pa. L. Rev. 369, 370 (1939); 13 So. Calif. L. Rev. 533 (1940), particularly with respect to the brokerage provisions, Book Review, 24 A.B.A.J. 323 (1938), and which has been judicially excluded as not a "competent authority" for ascertainment of the legislative intent. *State Wholesale Grocers v. Great Atlantic & Pacific Tea Co.*, 154 F.Supp. 471, 485 (N.D. Ill. 1957), *aff'd in part and rev'd in part*, 258 F.2d 831 (7th Cir. 1958), *cert. denied*, 358 U.S. 947 (1959).

³⁵ The brief repeatedly abbreviates Section 2(c) as prohibiting payments by any person to the "other party," without mentioning the illuminating textual references to that *other* party's intermediary (FTC Br. pp. 2, 9, 13, 14, 20).

has no counterpart in the statutory language. The Commission's rationale, unable to muster a shred of legislative or judicial authority, thus hangs on manipulation of Section 2(c)'s text.³⁶

The Commission's "indirect payment" theory is equally contrived. Thus, Section 2(c) purportedly "prohibits a broker, acting solely for the seller and not controlled by the buyer, from passing on, *directly or indirectly*, to the buyer any part of his brokerage" (R. 208). Respondent's acceptance of a lower rate of commission "contemporaneous" with the seller's price reduction, the theory continues, "constitutes a payment of part of their commission to the buyer exactly as though respondents had paid two per cent of their commission to the buyer direct" (R. 209).³⁷ And while the Commission's opinion shunned the legislative history of 2(c) in favor of Robinson-Patman "climate" (R. 207), its brief quotes excerpts of the legislative reports containing the word "indirect" (FTC Br. pp. 17-18, cf. 12, 20, 22).

But the cropped Committee reports do not supply the missing term "indirectly" in Section 2(c) to validate any theory of "indirect" payments to the buyer by the broker's acceptance of a smaller fee. They

³⁶ Before the Court of Appeals, FTC counsel first contended that "a seller's broker is party to the transaction" (Br. p. 27), and then interpolated the spurious word "from" into Section 2(c) (R. 222). Refuting the asserted "broadly" framed text of Section 2(c), the *AdP* decision long ago observed that the Brokerage Clause "deals with one particular subject," and "constitutes a specific prohibition of a specific act." 106 F.2d at 676-677.

³⁷ By the same reasoning, an increase in the broker's commission coupled with a higher price would presumably be an illicit "indirect payment" of brokerage by the buyer to the broker by way of the seller.

concern solely payments by the seller to a buyer through the buyer's front, the conventional target of the Brokerage Clause. Rather than supporting the FTC theory, they lay bare the attempt, called "realistic reading" (FTC Br. p. 25), to improve on the text enacted by Congress by filling in what the FTC Examiner's report frankly deemed an "omission" of the word "indirect" in Section 2(c) (R. 196, 198).

Such tampering with the text of the statute cannot be countenanced. As this Court's *Simplicity* opinion declared, in a principle governing FTC respondents and FTC alike, "We cannot supply what Congress has studiously omitted." 360 U.S. at 67. Tinkering with the text of a legal prohibition two decades later is particularly invidious when it contrives a "strained construction, and cannot be reconciled with the consistent reading" by everyone concerned for over twenty years. *United States v. Atlantic Refining Co.*, 360 U.S. 19, 22 (1959).

II.

THE COMMISSION PROVOKES NEEDLESS CONFLICT BETWEEN THE ROBINSON-PATMAN ACT AND THE NATIONAL ANTI-TRUST POLICY OF FOSTERING COMPETITIVE PRICING FOR THE BENEFIT OF THE CONSUMING PUBLIC.

This final part of our argument details how the FTC's invalid interpretation of Section 2(c), admittedly promotive of "price rigidity and uniformity" (Br. pp. 12, 26), operates to fix and maintain brokers' commissions contrary to antitrust proscriptions enforced by the Antitrust Division of the Department of Justice. The Federal Trade Commission's paradoxical position of policing high brokers' fees not only perverts the design of the Robinson-Patman Act, but flouts this Court's *Automatic Canteen* formula to

"reconcile" that statute with "broader antitrust policies." 346 U. S. at 74. Nor can belated rationalizations concerning "small retailers" prejudiced by an alleged "serious loophole" condone an unprecedented departure from Section 2(c) benefiting the organized brokers at the expense of the public.

(1) The Commission's Theory Fixes and Maintains the Level of Brokerage Commissions Contrary to Antitrust Proscriptions.

The inevitable consequence of the theory advocated by the FTC is to chill price bargaining and freeze brokerage fees into law at artificially high levels.

The heart of the Commission's case is that the Robinson-Patman Act shelters brokers' fees from downward adjustment in the course of competitive price bargaining. For in the FTC's conception of Section 2(c), a seller's price reduction reflecting savings in legitimate brokers' commissions is *per se* prohibited as an "allowance in lieu of" brokerage (Br. p. 27). Once a broker enters the distribution picture, a seller may neither reduce the broker's fee nor cut out his services entirely to achieve marketing economies translated into a lower price. Like so-called "Fair Trade" guaranteeing a retailer's profit "margin," the broker's commission would be "maintained" under penalty of law.

From the viewpoint of brokers as a class, their commission rates would then enjoy a privileged legal sanctuary monitored and policed through the FTC. And, as illustrated by the nasty correspondence of Phipps, the broker who lost the Smucker sale (pp. 8-9, *supra*), Section 2(c) would serve as a bludgeon to coerce buyers

and sellers any time their competitive price bargaining imperiled a broker's accustomed fee.³⁸

Yet comparable mechanisms to fix and maintain commissions in other areas of the economy have been rigorously prosecuted as illegal restraints of trade under the Sherman Act.³⁹ Stabilization of brokers' commissions was featured in the notorious Sugar Institute code, outlawed in *United States v. Sugar Institute*, 15 F. Supp. 817, 840-41 (S. D. N. Y. 1934), *aff'd*, 297 U. S. 553, 587-88, (1936). And such restraints stand con-

³⁸ Respondent's rival Phipps in identifying the "feather in somebody's cap" talked about being "found out by any member of the National Brokerage Association that wanted to have a gripe" (R. 44). And the former Chief Economist of the FTC has pointedly noted "the zeal of the National Association of Food Brokers in bringing violations of this section of the act to the commission's attention." Corwin D. Edwards, *Twenty Years of the Robinson-Patman Act*, 29 J. Bus. U. of Chi. 149, 151-152 (1956).

See also recent Congressional testimony by the National Food Brokers Ass'n, enjoined from collusive restraints on competition, note 48, *infra*: "We have been active in this Robinson-Patman work. Food brokers are an active bunch of people. They have to be in order to remain in this highly competitive business. It isn't hurting us. We don't want to see the FTC hurt. We think there is a great need for that agency. For that information we are still working very closely with them. We will continue to do so. They have not hurt us one bit." *Statement of Watson D. Rogers, in Hearings before the Select Committee on Small Business, House of Representatives, on Price Discrimination, The Robinson-Patman Act and Related Matters, 84th Cong., 1st Sess. 422 (1955).

³⁹ E.g., *United States v. National Ass'n of Real Estate Boards*, 339 U. S. 485 (1950); *United States v. American Ass'n of Advertising Agencies, Inc.*, 1956 CCH Trade Cases par. 68, 252 (S. D. N. Y. 1956). Restraints which operate on prices, the "central nervous system of the economy," are illegal whether pursued by "horizontal" conspiracy among distributors or by "vertical" restrictions. E.g., *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 226 n. 59 (1940); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951); *United States v. Bausch & Lomb Optical Co.*, 321 U. S. 707 (1944).

denied whether "accomplished by express contract or by some more subtle means," *United States v. McKesson & Robbins, Inc.*, 351 U. S. 305, 310 (1956), for "Subtle influences may be just as effective as the threat or use of formal sanctions to hold people in line." *United States v. National Ass'n of Real Estate Boards*, 339 U. S. 485, 489 (1950).

As the court below aptly observed, "Trade restraints in the distribution of groceries surely do not occupy a preferred antitrust position" (R. 224).⁴⁰

(2) The Commission's Theory Defeats the Legislative Design of the Robinson-Patman Law and Mocks This Court's Directive to Reconcile the Act With National Antitrust Policy.

By extending the "absolute" bans of Section 2(c) so as to maintain the level of brokers' commissions, the FTC disrupts the Congressional design of the Robinson-Patman Act.

The 1936 Robinson-Patman amendments codify a Congressional objective to nip destructive discriminatory practices without paralyzing the price flexibility essential to a free economy. The original Patman bill in 1935, introduced two weeks after *Schechter* eviscerated the Blue Eagle of NRA,⁴¹ outlawed all price discrimination irrespective of competitive effects and the necessity of sellers to meet competition,

⁴⁰ E.g., *Food & Grocery Bureau v. United States*, 139 F. 2d 973 (9th Cir. 1943); *California Retail Grocers & Merchants Ass'n v. United States*, 133 F. 2d 978 (9th Cir. 1943), cert. denied, 322 U. S. 729 (1944); *National Food Brokers Ass'n*, 52 F. T. C. 372 (1955).

⁴¹ *Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935). The genesis of the Robinson-Patman amendments and the so-called Fair Trade laws in the wake of NRA is traced in a Harvard Political Study, Palamountain, *The Politics of Distribution* cc. VII-VIII (Harv. Univ. Press 1955).

as well as prohibiting "dummy" brokerage and "pseudo-advertising allowances." But Congress modified the bill to ban solely those "unjustified" price differentials inimical to competition. Only the prohibition on "false" brokerage and promotional arrangements was left "absolute," in order to discourage concealed price variations and to forge price differentials out "into the open." *Cf. Simplicity* opinion, 360 U. S. at 68 n. 13.

Under the Commission's theory, the open price reductions made possible by "more economical processes" which Congress wished to preserve, *id.* at 71 n. 18, would become "absolutely" illegal under the Brokerage Clause. Wherever brokers operate, all price adjustments, unless they guaranteed the broker's commission, would face legal jeopardy—notwithstanding the repeated assurances that the law "will in no way shelter or protect brokers" (Patman, 80 Cong. Rec. 7760), "does not affect legitimate brokerage" (Logan, *id.* at 6281), and that "There is nothing in the bill that requires the employment of a broker" (Utterback, *id.* at 9418). See also *id.* at 3118, 7759, 7886.

The Federal Trade Commission's doctrine, which admittedly promotes "price rigidity and uniformity" at least in the "short run" (FTC Br. pp. 12, 26), surely flouts this Court's admonitions to ensure a harmonious national antitrust policy.

In the *Automatic Canteen* decision of 1953, this Court set aside a Robinson-Patman interpretation by the Commission which fostered "a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." 346 U. S. 61, 63 (1953). The

Commission's theory was disapproved "in view of the effect it might have on that sturdy bargaining between buyer and seller for which scope was presumably left in the areas of our economy not otherwise regulated." *Id.* at 73-74. The Court noted that "Time and again there was recognition in Congress of a freedom to adopt and pass on to buyers the benefits of more economical processes," *id.* at 72 n. 11, and stressed a "duty to reconcile such interpretation, except where Congress has told us not to, with the broader antitrust policies that have been laid down by Congress." *Id.* at 73-74.⁴²

And in the analogous Fair Trade field of resale price maintenance, this Court's *McKesson & Robbins* decision confirmed that "Congress has marked the limitations beyond which price fixing cannot go. We are not only bound by those limitations but we are bound to construe them strictly, since resale price maintenance is a privilege restrictive of a free economy." 351 U. S. 305, 316 (1956).

(3) Belated Rationalization on Behalf of the "Small Retailer" Cannot Condone Subordination of the Public Interest in a Competitive Economy for the Real Benefit of Another Private Business Class.

The afterthought argument that the Commission's theory is essential to protect "small retailers" and "small merchants" prejudiced by a purported "serious loophole" in favor of "large buyers" (FTC Br. pp. 11, 12-13, 21, 25-27), misstates the import of the deci-

⁴² The Second Circuit recently also set aside the Commission's "radical departure from prior applications" of Section 2(d), where "any allowance given on the first sale could never be adjusted to meet competition. Such a rigid application of Section 2(d) would stifle rather than encourage competition and have the practical effect of outlawing all promotional allowances." *Atalanta Trading Corp. v. Federal Trade Commission*, 258 F. 2d 365, 368, 371 (2d Cir. 1958).

sion below, and defeats the interest of the public in competitive food distribution.⁴³

To begin with, the decision below creates no "serious loophole" and bestows no legal dispensations on so-called "large buyers." While the FTC brief proclaims that "the holding of the court below would permit a large buyer to demand and receive from a seller's broker a substantial direct rebate of part of the latter's commission" (Br. p. 21), that decision neither considers nor concerns any demands or receipts by buyers, "large" or small, of "rebates" of "part" or all of a broker's commission, "direct" or indirect, "substantial" or not.⁴⁴ On the contrary, the Court of Appeals stressed that "Neither in substance nor in fact, directly or indirectly, did Broch pay anything to Smucker" (R. 224), and that here the buyer did "not

⁴³ The Commission's brief below asserted that "Where Congress has imposed specific prohibitions by enactment of the Robinson-Patman Act, there is no room for conjecture as to how enforcement of that Act might redound to the disadvantage of the public" (FTC Br. p. 38). The present claim that the "public interest" is not a component of a Clayton Act proceeding (Br. p. 28 n. 9) is contradicted by the Commission's "policy as to private controversies," codified in its Revised Rules of Practice, 16 Code Fed. Regs. § 1.21 (Supp. 1959), which declares that the "Commission acts only in the public interest, against alleged unfair methods of competition or unfair, deceptive or monopolistic practices," and "does not take action when the alleged violation of law is merely a matter of private controversy and does not tend adversely to affect the public."

⁴⁴ Such activities were indeed held illegal by the court below in *Independent Grocers Alliance Distributing Co. v. Federal Trade Commission*, 203 F. 2d 941 (7th Cir. 1953); *Modern Marketing Service, Inc. v. Federal Trade Commission*, 149 F. 2d 970 (7th Cir. 1945).

suggest or even know of the reduction in the seller's brokerage commission" (R. 223).⁴⁵

In short, nothing in the decision below exempts discriminatory exactions by buyers from Section 2(c)'s ban on illicit brokerage concessions, or Section 2(f)'s prohibition on discriminatory price receipts.

Since furthermore the nefarious maneuvers purportedly approved by the decision below one year ago are *today* being successfully enjoined by the Commission, the "serious loophole" in the law painted by the FTC brief has up till now defied detection.⁴⁶ Quite unembarrassed by that decision, the Commission has just

⁴⁵ Moreover, the buyer paid the seller's invoice price, *i.e.*, there was no double bookkeeping by the broker which would permit the buyer to pay less than the seller had quoted to the broker (cf. FTC Br. p. 22).

⁴⁶ The "loophole" assertion was documented in the FTC petition with such authorities as the Texas Food Merchant and the Food Field Reporter (Pet. 6 n. 4). Since the judgment below, the Commission has launched at least eight formal complaints attacking illicit brokerage payments to the buyer by the seller or his broker, *Bill the Distributor, Inc.*, Dkt. 7379 (Jan. 27, 1959); *Minute Maid Corp.*, Dkt. 7517 (June 11, 1959); *Hadid Brokerage Co.*, Dkt. 7518 (June 11, 1959); *D. L. Piazza Co.*, Dkt. 7519 (June 11, 1959); *Eagan, Fickell & Co.*, Dkt. 7520 (June 11, 1959); *Kadiak Fisheries Co.*, Dkt. 7562 (Aug. 6, 1959); *Southern Fruit Distributors, Inc.*, Dkt. 7566 (Aug. 7, 1959); *Smith Grain Co.*, Dkt. 7641 (Nov. 18, 1959). In the same months, twelve respondents in at least four additional formal proceedings voluntarily accepted FTC orders to cease and desist—from the very conduct said to be approved by the Court of Appeals. *Puget Sound Brokerage Co., et al.*, Dkt. 7151 (Feb. 17, 1959); *Park's Canning Co., et al.*, Dkt. 7200 (Feb. 12, 1959); *E. H. Hamlin Associates, et al.*, Dkt. 7204 (Feb. 12, 1959); *Edward Packing Co., et al.*, Dkt. 7249 (Feb. 12, 1959).

warned "powerful food buyers" of a reinvigorated enforcement campaign against illegal exactions.⁴⁷

More important than its bloated representation of the holding below, the Commission's solicitude for "small merchants" under the Brokerage Clause is a paradox (FTC Br. pp. 20-22). The first victim of that concern is this respondent, a "small merchant" with a desk-and-telephone partnership, whose competitive operations the Commission's theory would squelch. The "feather in somebody's cap" (R. 44) from such perverse 2(c) enforcement rather belongs to the organized food brokers who crave a privileged monopoly for their commission rates under the aegis of the FTC. In realistic perspective, the "small merchant" rationalization subordinates the paramount public interest in a competitive economy to the private advantage of a special class allergic to the competition other businessmen must face.⁴⁸

⁴⁷ Legal Obligation of Powerful Food Buyers, Statement by FTC Chairman Kintner before National Ass'n of Food Chains, p. 8 (FTC Mimeo: Oct. 19, 1959).

⁴⁸ The application of Section 2(c) advocated here, the Federal Trade Commission's former Chief Economist has written, "goes far to give such brokers a legally supported monopoly of distribution in the lines in which they are already well established." Corwin D. Edwards, *Maintaining Competition* 169 (McGraw-Hill 1949). See also Fulda, *Food Distribution in the United States*, 99 U. Pa. L. Rev. 1051, 1101 (1951). Cf. *National Food Brokers Ass'n*, 52 F. T. C. 372 (1955) charging and enjoining restrictions on competition and the coercion of non-conformists by the organized brokers as unlawful "agreements, understandings, combination and planned common course of action" * * * to the prejudice and injury of the public." *Id.* at 380. See also notes 3, 4, 38, 40, *supra*; 49, *infra*.

If there is any moral in the history of cartels and collusion sheltered by agencies of the State, it is that "small merchants" hold no patent on virtue. And in this day and age, the so-called "big buyer" is surely an outworn forensic ogre. As this Court once before wrote in a Robinson-Patman case, "To decide issues of law on the size of the person who gets advantage or claims disadvantage is treacherous." *Bruce's Juices, Inc. v. American Can Co.*, 330 U. S. 743, 753 (1947).

At stake now is not the private rights of merchants, large or small, but the interest of the consuming public. For, in the perceptive statement of the decision below:

"Obviously an important element in the cost of food distribution is the commission paid by sellers to their brokers. If a seller is to be forbidden to meet competition by reducing an item in its cost of distribution, then to that extent his costs are frozen without regard for the welfare of the public which must ultimately defray the resultant costs of distribution" (R. 224).

CONCLUSION

When an agency chartered by Congress to promote competition and to protect the consumer sets out—with undoubted earnestness and purity of purpose—to frustrate this paramount objective for the inevitable benefit of a special business class, the malaise of the regulatory commissions goes deep indeed.⁴⁹

For all of the preceding reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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⁴⁹ See Editorial, "The Regulatory Commissions," New York Times, Sept. 30, 1959, p. 36.

With respect to the National Association of Retail Grocers, whose brief *amicus curiae* adds color rather than light, see Palamoun, *The Politics of Distribution*, 201-203, 232-33 (Harv. Univ. Press 1955); cf. Adelman *Effective Competition and the Antitrust Laws*, 61 Harv. L. Rev. 1289, 1336 (1948).

The National Food Brokers Association (NFBA) has not filed an appearance or brief. But "NFBA is watching closely developments in the *Broch* case. * * * NFBA is conferring with FTC officials to get their reaction to the case, and the next step to be taken." NFBA News, Dec. 26, 1958, p. 2. Also "NFBA has discussed this case with all of the FTC Commissioners. They all realize the danger in the Appellate Court's decision. They state that their present feeling is that they will recommend an appeal to the Supreme Court." NFBA News, Jan. 8, 1959, p. 1.

LEGISLATIVE HISTORY OF
SECTION 2(c) OF THE CLAYTON ACT
AS AMENDED BY THE ROBINSON-PATMAN ACT

Legislative History of Section 2(c) of the Clayton Act as Amended by the Robinson-Patman Act

COMMITTEE REPORTS

HOUSE COMMITTEE REPORT

**Report of the House Judiciary Committee, H.R. Rep. No. 2287,
74th Cong., 2d Sess. (1936):**

Section (b) deals with the abuse of the brokerage function for purposes of oppressive discrimination. The true broker serves either as representative of the seller to find him market outlets, or as representative of the buyer to find him sources of supply. In either case he discharges functions which must otherwise be performed by the parties themselves through their own selling or buying departments, with their respective attendant costs. Which method is chosen depends presumptively upon which is found more economical in the particular case; but whichever method is chosen, its cost is the necessary and natural cost of a business function which cannot be escaped. It is for this reason that, when free of the coercive influence or mass buying power, discounts in lieu of brokerage are not usually accorded to buyers who deal with the seller direct since such sales must bear instead their appropriate share of the seller's own selling cost.

Among the prevalent modes of ~~discrimination~~ at which this bill is directed is the practice of certain large buyers to demand the allowance of brokerage direct to them upon their purchases, or its payment to an employee, agent, or corporate subsidiary whom they set up in the guise of a broker and through whom they demand that sales to them be made. But the positions of buyer and seller are by nature adverse, and it is a contradiction in terms incompatible with his natural function for an intermediary to claim to be rendering services for the seller when he is acting in fact for or under the control of the buyer, and no seller can be expected to pay such an intermediary so controlled for such services unless compelled to do so by coercive influences in compromise of his natural interest.

Whether employed by the buyer in good faith to find a source of supply, or by the seller to find a market, the broker so employed discharges a sound economic function and is entitled to appropriate compensation by the one in whose interest he so serves. But to permit its payment or allowance where no such service is rendered, where in fact, if a "broker", so labeled, enters the picture at all, it is one whom the buyer points out to the seller, rather than one who brings the buyer to the seller would render the section a nullity. The relation of the broker to his client is a fiduciary one. To collect from a client for services rendered in the interest of a party adverse to him is a violation of that relationship; and to protect those who deal in the streams of commerce against breaches of faith in its relations of trust, is to foster confidence in its processes and promote its wholesomeness and volume.

Section (b) permits the payment of compensation by a seller to his broker or agent for services actually rendered in his behalf; Likewise by a buyer to his broker or agent for services in connection with the purchase of goods actually rendered in his behalf; but it prohibits the direct or indirect payment of brokerage except for such services rendered. It prohibits its allowance by the buyer direct to the seller, or by the seller direct to the buyer; and it prohibits its payment by either to an agent or intermediary acting in fact for or in behalf, or subject to the direct or indirect control, of the other. H. R. Rep. at 14-15.

SENATE COMMITTEE REPORT

**Report of the Senate Judiciary Committee, S. Rep. No. 1502,
74th Cong., 2d Sess. (1936):**

In section (b) the phrases "or any allowance or discount in lieu thereof", and "either to the other party to such transaction" are added by your committee's recommendation. As so revised, this section forbids the payment or allowance of brokerage either to the other principal party, or to an intermediary acting in fact for or under the

control of the other principal party, to the purchase and sale transaction.

Among the prevalent modes of discrimination at which this bill is directed, is the practice of certain large buyers to demand the allowance of brokerage direct to them upon their purchases, or its payment to an employee, agent, or corporate subsidiary whom they set up in the guise of a broker, and through whom they demand that sales to them be made. Whether employed by the buyer in good faith to find a source of supply, or by the seller to find a market, the broker so employed discharges a sound economic function and is entitled to appropriate compensation by the one in whose interest he so serves. But to permit its payment or allowance where no such service is rendered, where in fact, if a "broker", so labeled, enters the picture at all, it is one whom the buyer points out to the seller, rather than one who brings the buyer to the seller, is but to permit the corruption of this function to the purposes of competitive discrimination. The relation of the broker to his client is a fiduciary one. To collect from a client for services rendered in the interest of a party adverse to him, is a violation of that relationship; and to protect those who deal in the streams of commerce against breaches of faith in its relations of trust, is to foster confidence in its processes and promote its wholesomeness and volume. S. Rep. at 7.

CONFERENCE COMMITTEE REPORT

Conference Committee Report, H.R. Rep. No. 2951, 74th Cong., 2d Sess. (1936):

Subsection (c) deals with brokerage. It is the same as subsection (b) in the House bill, which in turn is the same as subsection (c) in the Senate amendment, except that the words "except for services rendered", as contained in the House bill, do not appear in the Senate amendment. In the conference report these words are retained, so that, with adjacent language, it reads:

* * * any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares or merchandise, * * *

With the words of the House bill thus retained, this subsection permits the payment of compensation by a seller to his broker or agent for services actually rendered in his behalf; likewise by a buyer to his broker or agent for services in connection with the purchase of goods actually rendered in his behalf; but it prohibits the direct or indirect payment of brokerage except for such services rendered. It prohibits its allowance by the buyer direct to the seller, or by the seller direct to the buyer; and it prohibits its payment by either to an agent or intermediary acting in fact for or in behalf, or subject to the direct or indirect control, of the other. Conf. Rep. at 7.

DEBATES

Representative Wright Patman. Co-author of the Robinson-Patman Act:

Patman

Question. What specific provisions are included in this bill?

Answer. First. Advertising allowances. * * * Second. Dummy brokerage. A practice has grown up whereby large mass buyers bribe representatives of the seller, oftentimes the seller representing groups of farmers, under the guise of a brokerage allowance. It is not a brokerage allowance at all; it is a bribe. This bill will not compel the use of a broker but it will prohibit one party from bribing the representative of the other under the guise of brokerage allowances or commissions. 80 Cong. Rec. 7759-60 (May 21, 1936).

Patman

Question. After these amendments have been adopted, what essential provisions will be contained in the bill?

Answer. What the sponsors first proposed and are now insisting upon, that is, an effective law against pseudo-advertising allowances, dummy brokerage allowances, quantity discounts in excess of differences in cost of manufacture and distribution, and authority granted to the Federal Trade Commission to fix quantity limits to prevent monopoly. 80 Cong. Rec. 7760 (May 21, 1936).

* * * * *

Patman

Question. Will this law build a fence around brokers and wholesalers, grant them a bonus or subsidy, or benefit them in any way?

Answer. This law will in no way shelter or protect brokers and wholesalers. It will benefit them to the extent only that they are able to render a service at equal or lower costs than anyone else. This law will not compel a broker or wholesaler to be used. Sales may be made directly from a manufacturer to the retailer or to consumers, but if brokerage or wholesale allowances are paid, they must be paid for services rendered and not used as a bribe. 80 Cong. Rec. 7760 (May 21, 1936).

* * * * *

Patman

Question. Is there anything in this bill that will require middlemen to be used?

Answer. Absolutely nothing. The only provision about brokers and wholesalers will merely prevent fees and commissions ordinarily paid to brokers and wholesalers from being used as bribes. 80 Cong. Rec. 7886 (May 25, 1936).

* * * * *

Patman

One great concern in America last year compelled manufacturers to pay it \$8,000,000 in pseudo-advertising allow-

ances and pseudo-brokerage charges. That amount of benefits the independent merchants of the country were not entitled to receive from the same manufacturers, purchasing the same quantity under the same conditions. You are in favor of giving the citizens the same right as the corporations in this country, and that is all that we are asking in this bill.

MR. COX. Mr. Chairman, will the gentleman yield?

MR. PATMAN. Yes.

MR. COX. For an observation. In effect that practically forces the independent buyer to provide the fund that goes by way of rebate and advertising to the big buyer, giving him an advantage.

FARMER REPRESENTATIVES FROM NEW YORK CITY

MR. PATMAN. That is right, giving him an advantage in that way. Another is this dummy brokerage. Let me tell you something about the farmers. You hear talk about saving the farmers. Are we going to have to go to the heart of New York City and get Congressman CELLER and Congressman PEYSER and Congressman BLOOM to come down here and speak for the farmers of this country? They are the principal opponents of this bill. They appeared before the Rules Committee in opposition to a rule. In the investigation we discovered the corporate chains were strong enough to use a few farmers as a front, or a stuffed shirt, as the mouthpiece for them. The investigation disclosed that, and the officials of the chain stores were so pleased with it that they referred to them as the "cornstalk brigade." So I guess Congressman CELLER and Congressman BLOOM and Congressman PEYSER would like to have the use of another cornstalk brigade here before Congress. They are not going to fool the farmers or the representatives of the farmers.

DUMMY BROKERAGE

Take this dummy-brokerage allowance.

There is a merchant in Virginia representing potato growers. He sells thousands of cars of potatoes a year, and our investigation has disclosed that he had a secret contract with a large mass corporate chain buyer by which he obligated himself to sell every car of those potatoes of those farmers to this large buyer. At what price? Oh, at the market price. That sounds good, but fortunately for the large mass buyer, he was big enough to make the market price. They do make the market in those localities. This man representing the farmers sold those potatoes to that mass buyer, fixing the price himself, and what did he get out of it? He got a secret rebate of \$2.50 to \$5 on every car that the farmers knew nothing about, and the trade was, "If I don't deliver you every car, for every car that I do not deliver you I will be penalized \$5." That is the kind of dummy-brokerage arrangement we are trying to prohibit in this bill.

This is a bill to protect the farmers of this country, I say to my distinguished friends from the heart of New York where holders of privilege reside. I heard one witness before the Rules Committee say that 90 percent of the people affected by this bill live in two congressional districts in New York City. I do not take issue with that statement. I believe it is absolutely true, that 90 percent of them live in those two congressional districts. What are they asking for? They are asking these special rights and privileges and benefits that they are not entitled to enjoy as a matter of right and justice be continued. How? By openly fighting? The representatives of the special interests will not openly fight them, but you will never get a bill that they will favor. There is something wrong with every bill that is presented. We are trying to prevent the dummy brokerage, prohibit a man from doing something for hire against the interest of the person that he is supposed to represent. 80 Cong. Rec. 8111-12 (May 27, 1936).

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Patman

In this bill, Mr. Chairman, we are asking for those main points, to eliminate these pseudo-advertising allowances given only for the purpose of favoring the large corporate chains. We are asking that the dummy brokerage be eliminated to the extent that it cannot be used as a bribe to make one person go back upon the person who employed him and betray him. That is, if you are against deceit and trickery and treachery, you certainly ought to be against this dummy brokerage. 80 Cong. Rec. 8112 (May 27, 1936).

Senator M. M. Logan, Chairman of Senate Judiciary Subcommittee considering the Robinson-Patman amendments of the Clayton Act and Senate Manager of the bill:

Logan

Now, turning to the provisions of the bill that seek more definitely to accomplish the purpose intended, I desire to refer to subparagraph (b) relating to rebates, or payments as a commission, brokerage, or other compensation, or any allowance in lieu thereof, in connection with the sale or purchase of goods, wares, or merchandise, either to the party to such transaction, or to an agent, representative, or other intermediary therein, where such intermediary is acting in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is paid.

The Clayton Act was intended to prevent discrimination in prices where such discrimination tended to create a monopoly. This bill forbids the payment or allowance of brokerage either to the other principal party, or to an intermediary acting in fact for or under the control of the other principal party to the purchase and sale transaction.

This is one of the most prevalent schemes to evade the provisions of the law. Some large buyers demand the allowance of brokerage direct to them on the purchases which they make, or the payment of such brokerage to some intermediary of such a buyer who is an employee, agent,

or corporate subsidiary for the buyer which has been set up in the guise of a broker, and through which they require that sales to them must be made.

The legitimate broker has an important place in trade, and it is not intended to interfere at all with his legitimate business. Where he is employed by the buyer in the field to find a source of supply, or by the seller to find a market, he is discharging a sound and reasonable function, and is entitled to appropriate compensation by the one he serves. It is an entirely different thing, however, to allow payment or allowance under the guise of brokerage where no such service is rendered, and where the supposed broker is only a dummy pointed out by the buyer to the seller, rather than one who brings the buyer to the seller. This scheme corrupts a legitimate function to the purposes of competitive discrimination. The relationship existing between a broker and his client is fiduciary. To allow a broker to collect from a client for services rendered to the adverse party is a violation of that relationship. Such rebates, fostered by schemes under the guise of brokerage, for the sole purpose of bringing about unfair discriminations, should not be allowed, and are prohibited by this bill. 80 Cong. Rec. 3114 (March 3, 1936).

Logan

MR. LOGAN. * * * One of the favorite methods is what is known as the brokerage scheme. If some buyer goes to a seller desiring to buy a large quantity of goods, he may say to him, "You must sell through this broker over here", who is an employee of the buyer; "and you must pay him brokerage", which the seller does, to his loss. The supposed broker turns the brokerage over to the buyer, and in that way it amounts to a rebate on the price of the goods which were purchased, and, of course, it enhances the profits of the buyer.

MR. GEORGE. What I wanted to get perfectly clear, if I could, was whether the same prohibitions relate to both the giver and the taker of a rebate in any form.

MR. LOGAN. The prohibition is against its being done at all, and, of course, it would apply to the giver as well as to

the taker, although there is no criminal penalty provided. 80 Cong. Rec. 3114-15 (March 3, 1936).

Logan

MR. GEORGE. I beg the Senator's pardon for interrupting his presentation. I had the impression that the bill did impose penalties on the giver of a rebate, and I wanted to know whether it imposed like prohibitions, or penalties, or whatever the bill provides, on the taker.

MR. LOGAN. The bill prohibits the act, and that prohibition would extend alike to all who are affected by it.

MR. GEORGE. Both to the giver and to the taker, of course?

MR. LOGAN. Yes; that is true. 80 Cong. Rec. 3115 (March 3, 1936).

Logan

MR. GORE. I was a member of the Committee on Interstate Commerce which prepared the Clayton Act, and was very much interested in section 2, and the abuses which it sought to correct.

MR. LOGAN. Let me tell what happened. The section of the act to which the Senator has referred was evaded by able lawyers representing those who controlled large purchasing power. One of the first schemes was to set up what they called a brokerage system, and compel a seller to use the services of a broker, who may have been an employee, who at least was under the control of the buyer, or it may have been some subsidiary corporation of the buyer.

One large chain received last year \$6,000,000 or \$8,000,000 in brokerage fees. The bill attempts to prohibit that scheme. That is one of the most important things it seeks to do. It does not interfere with legitimate brokerage, but it makes it an unfair discrimination to grant such a brokerage in the nature of a rebate to one and

not grant it to another. 80 Cong. Rec. 3116 (March 3, 1936).

Logan

Among the many statements I have received sent out by those opposing the enactment of Senate bill 3154 is one the title of which is "Twenty-eight Questions That Suggest a Million Others." The 28 questions submitted are ridiculous in the extreme, and show that the organization that sent out the questions either does not know what the bill contains or has no regard for truth. I wonder at times how long it will be until some organizations find that the people are wiser than they ever thought them to be. One of the first questions in the pamphlet I have mentioned undertakes to suggest that brokerage must be allowed to none or all. The bill has nothing to do with brokerage at all. The bill deals with schemes and shams used to bring about discriminations in prices.

It is suggested in the first question submitted that a mine paying a broker \$50 a car must charge every other consumer \$50. That is not true. A legitimate broker can charge whatever his employer may be willing to pay without the violation of any provisions of the proposed act. 80 Cong. Rec. 3118 (March 3, 1936).

Logan

I shall now speak of the matter of brokerage. Let me say in the beginning that the bill does not affect legitimate brokerage either directly or indirectly. Where the broker renders service to the buyer or to the seller the bill does not prohibit the payment of brokerage. It is not aimed at the legitimate practice of brokerage, because brokerage is necessary. The broker has a field all his own and he should not be interfered with. In order to evade the provisions of the Clayton Act, however, it was found that while direct price discrimination could not be indulged in, the buyer, if he were sufficiently powerful, could designate someone and say, "That is my broker." Perhaps it was a clerk in his office. Perhaps it was a manager of a store. Perhaps it was a subsidiary corporation organized for the

purpose. However, the buyer would say to the seller, "You must sell through that man, and you must pay him a certain percentage or amount of brokerage"; and when the so-called broker or dummy broker received what was paid him, he turned it over to the buyer, and in that way a price discrimination was brought about.

I undertake to say in this august body that there is not a Member of the Senate, there is not a Member of the House, who will not at once condemn a practice of that kind, which provides secret rebates under the guise of brokerage. 80 Cong. Rec. 6281 (April 28, 1936).

Logan

The first thing which the Robinson bill does—and it represents about one-third of the bill—is to provide that no buyer shall engage in this trick brokerage practice whereby a rebate may be made by the seller. Under the provisions of the bill no payment may be made to a man acting as a broker unless he actually is a broker. Is there anyone in the whole country, from one end of the Nation to the other, who will not heartily approve of the provisions of the bill aimed at fraudulent practices like that which tend toward the destruction of the small man and also tend toward the destruction of the seller himself in many instances? Should not such practices be prevented, if we can prevent them? That is the first thing in the bill. 80 Cong. Rec. 6282 (April 28, 1936).

Logan

In the second section of the committee amendment there is a provision that in making discriminations or differentials, or whatever we may choose to call them, all costs other than brokerage shall be allowed; and it has been said that the words "other than brokerage" in that section ought to go out.

I have thought a good deal about that suggestion. I think perhaps legitimate brokerage ought to be allowed

as a part of the costs; and I think when the bill was drafted—I did not write the bill—perhaps in the amendment which was inserted by the Judiciary Committee of the Senate we had in mind dummy brokerage, sham brokerage. It may be that something should be done about that. I call it to the attention of the Senate, so that some of the other Senators may consider it. 80 Cong. Rec. 6285 (April 28, 1936).

Representative Hubert Utterback. Chairman of the Senate/
House Conference Committee:

Utterback

The bill prohibits payment or allowance of brokerage or commission except for services rendered. As explained more fully in the report of the House Committee on the Judiciary, this refers to true brokerage services rendered in fact for the party who pays for them, whether he be an agent employed and paid by the seller to find market outlets or one employed and paid by the buyer to find sources of supply. As the bill further enumerates, it prohibits the payment or allowance of commissions or brokerage on the purchase or sale of goods either to the other party to the transaction or to an intermediary who is acting in fact for or under the control of the other party to the transaction; that is, the party other than the one who pays the commission or brokerage in question. There is nothing in the bill that requires the employment of a broker; there is nothing to prevent sales direct from seller to buyer. But if an intermediary is employed, and is in fact acting for or under the control of the buyer, then the seller cannot pay him. Or if he is acting for or under the control of the seller, then the buyer cannot pay him. And where sales are made from buyer to seller, in the nature of the case no brokerage services are rendered by either, and no payment or allowance on account thereof can be made by either party to the other. 80 Cong. Rec. 9418 (June 15, 1936).

COMMITTEE HEARINGS

H. B. Teegarden, counsel of the U. S. Wholesale Grocers Association, presented to the House Judiciary Committee by Representative Patman as the draftsman of the Patman bill and the expert as to its meaning. Hearings before the House Judiciary Committee on Bills to Amend the Clayton Act, 74th Cong., 1st & 2d Sess. 9, 13 (1935-36):

Teegarden

MR. McLAUGHLIN. Mr. Teegarden, I think this is a fair question: How do you propose, legislatively, to offset the advantages which have been recited here, which the chain stores have over the independents?

MR. TEEGARDEN. I can answer that by an analysis of the bill itself and of its various provisions, to which I shall immediately proceed.

This bill is drawn in 4 sections, 3 of which constitute substantive law and the fourth provides the remedy. Sections (a), (b), and (c) are directed, respectively, at unreasonable quantity discounts, at dummy-brokerage allowances, and pseudo-advertising allowances. It is drawn in this form because those are the three methods under which price concessions and discriminations are granted to buying organizations, are principally practiced in the experience of the trade. Hearings at 16.

Teegarden

QUESTION. Why does the bill pick out quantity prices, brokerage and advertising allowances for suppression?

ANSWER. Because these are the three favorite disguises under which large buyers wring their exactions. Hearings at 31.

Teegarden

QUESTION. Does the proposed amendment prohibit the payment of brokerage to companies whose stock is owned by corporate chains or wholesale grocers?

ANSWER. No; not by reason of such stock ownership alone. If it is owned for investment purposes only and the brokerage concern is left independent and free from control in the conduct of its business, that relationship is not disturbed. It prohibits payment of brokerage only to brokers who are in fact acting for or under the control of parties to the sale other than those who pay the brokerage * * * * Hearings at 37.

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Teegarden

MR. TEEGARDEN. I want to cover sections 2-B and 2-C briefly. Section 2-B relates to brokerage. It has been charged that Section 2-B prevents a merchant from owning stock in a brokerage concern, prevents the conduct of a brokerage business; that it compels the payment of brokerage or compels the employment of a broker in all sales between manufacturers and wholesalers or retailers; that it would compel A and B to employ private brokers instead of purchasing through its own subsidiary brokerage company.

It does none of these. It does one thing and one thing only. It leaves anyone free to select his broker or dispense with his services as he sees fit.

It provides, however, that if a broker enters into the picture, then he must be paid, if he is paid at all, by the party for whom he is really acting. It prohibits the payment of brokerage to an intermediary by any party to the transaction other than the one for whom the service is rendered. * * *

It simply prohibits a broker taking pay from one party for service rendered in fact to the other, and it would meet the evil where large buyers let it be known to manufac-

turers that they will not purchase except through their own subsidiary brokerage concerns.

Brokerage, you know, is a distinct economic function in itself. Every seller faces the problem of finding a market. Every buyer faces the problem of finding a source of supply. Either of them can do it by maintaining their own selling or their own buying departments with a consequent cost; or, if they find it more economical, they can engage a private independent contractor who makes it a business to keep his contacts with various sources of supply in various markets. And where that function is performed brokerage is proper.

But where A. & P. or another firm comes up to a manufacturer's door and says, "Here I am; a large buyer", that manufacturer does not need to engage a broker to find him a market. The brokerage function is not present there. And when A. & P. says "I will buy from you if you sell me through my brokerage concern and pay the brokerage which I will drain off in dividends", the brokerage function is being prostituted for the reaping of an unfair price concession. That is what it amounts to. That is the evil which this brokerage clause would prohibit. Hearings at 217-18.

Teegarden

* * * where, regardless of the form of the transaction, the broker is in fact acting for or under the control of any party to the sale other than the one who pays him, he is prohibited by the Robinson-Patman bill from receiving brokerage on that transaction. Hearings at 226.

Teegarden

The factual data presented before the committee amply establish that these evils are prevalently found:

- (1) [excessive quantity discounts]
- (2) In the payment of brokerage by the seller to dummy brokerage concerns owned and controlled by large buyers and serving the latter's interest.

(3) [disproportionate promotional payments].

It is in these three fields, accordingly, that the Patman bill visits its restrictions; and to them those restrictions are carefully limited, leaving full latitude:

(1) For differentials in prices or terms wherever they furnish an apt vehicle for the transmission of real comparative economies through the channels of distribution to the ultimate consumer;

(2) In the payment of brokerage wherever the brokerage function offers a real economic service, and where it is paid by the one who really benefits from that service, to the one who actually renders it in his behalf. * * * Hearings at 247.

* * *

Teegarden

* * * Brokerage is in itself a separate and distinct economic function, which may be utilized either by buyer or seller. Every seller has the problem of finding a market, every buyer a source of supply. This he may do through his own employees, with its natural resulting cost to him; or, where he finds it more economical, he may engage an independent agency, which makes it a business to keep widely informed in such matters, and which he compensates for its services on a commission basis. As such, he substitutes it for a function which he would otherwise perform himself, either personally or through his employees, and with equal propriety bears its costs.

The evil here in view arises from the practice of certain powerful buyers in setting up subsidiary brokerage concerns of their own, then informing their source of supply that the latter cannot hope to sell to them, unless they engage this brokerage concern for that purpose and pay it the usual brokerage. Regardless of name or form, such a concern necessarily acts in the interest of its parent buyer, to whom it also turns over its brokerage in the form of dividends or net proceeds after meeting its expenses. Thus, just as through advertising allowances large buyers are

able to saddle on to the manufacturer those advertising costs which their competitors must bear themselves; so through this dummy brokerage device they also manage to saddle off a good portion of their buying costs, which their competitors must also meet out of their own resources.

Section b. of the Patman bill, prohibits the payment of such brokerage wherever the broker is in fact acting for or under the control of the seller, instead of the buyer who pays him. If, in any case, the situation were reversed it would equally forbid a subsidiary brokerage concern maintained by the seller from collecting brokerage from the buyer. It leaves it a question of fact to be determined in each case, whether the broker "is acting therein for or on behalf, or is subject to the direct or indirect control" of parties to the sale other than those who pay him; and that question of fact depends naturally upon matters of evidence, such as percentage of stock control, character of the other stockholders, common officers or directors, the actual machinery of intercorporate operation, and the provisions of the express contract, if any exists. Hearings at 258-59.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

FEDERAL TRADE COMMISSION, PETITIONER

v.

HENRY BROCH AND COMPANY

**On Writ of Certiorari to the United States Court of Appeals
for the Seventh Circuit**

REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

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Respondent's primary contention is that the legislative history of Section 2(c) of the Clayton Act shows that Congress was concerned in that section with the use of dummy or fictitious brokers as a device for evading the price-discrimination prohibitions of Sec-

tion 2(a); and that the broad language of Section 2(c) should, therefore, be construed to cover only the precise evils which Congress had before it. Specifically, it would read into the prohibition in Section 2(c) on "any person * * * grant[ing] * * * any allowance or discount in lieu" of brokerage, the following qualifications: (1) "any person" means only a seller, not a seller's broker; and (2) "any allowance or discount in lieu" of brokerage means only an allowance or discount in lieu of "illegal" brokerage, *i.e.*, secret or fictitious brokerage.¹

"But we deal here with remedial legislation whose language should be given hospitable scope" and not "read * * * narrowly" (*Black v. Magnolia Liquor Co.*, 355 U.S. 24, 26). Furthermore, "courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in par-

¹ Throughout its brief, respondent repeatedly asserts (*e.g.*, pp. 2, 3, 15, 16, 19, 23-24, 27, 28, 32-33, 34) that the prohibitions of Section 2(c) apply only to "secret" discriminations and not to the "open" price reductions here involved. But Canada Food's discriminatory price reductions to Smucker were not "open" in the sense that they were generally known to Smucker's competitors or to the trade in the same way, for example, as a published quantity discount schedule. Discriminatory price reductions given directly to favored buyers are ordinarily kept just as confidential by both the giver and the recipient as when they are accomplished by fictitious or dummy brokerage. Indeed, after the other broker (Phipps) lost the Smucker sale to respondent, he wrote to the seller asking: "All we want to know is that your price quoted to other brokers was the same as that given to us" (R. 122). The seller did not answer the inquiry (R. 139-140). Thus, the price reductions in this case were "open" only in the sense that, if the Commission conducted an investigation, the fact that they had been given would appear on the face of the books and records of the participating parties.

particular cases the generally expressed legislative policy" (*Securities and Exchange Commission v. Joiner Corp.*, 320 U.S. 344, 350-351). The detailed provisions of Section 2(c), therefore, must be read in the light of the basic overall Congressional purpose and design in enacting the Robinson-Patman amendments to the Clayton Act, and not just the particular evils disclosed with respect to brokerage.

One thread that runs through the entire legislative history of the Robinson-Patman amendments is the fundamental concern of Congress generally to prevent distributive practices by which a large buyer would be able, solely as a result of greater purchasing power, to gain a competitive advantage over smaller buyers. For this was the basic flaw in Section 2(a) of the original Clayton Act. Despite that section's ban on price discriminations, large buyers continued to obtain "[c]omparable competitive advantages * * * in several [other] ways", such as obtaining rebates for fictitious brokerage services, receiving "[a]dvertising allowances * * * for certain promotional services undertaken by" them, and obtaining from sellers "special services or facilities" (*Federal Trade Commission v. Simplicity Pattern Co.*, 360 U.S. 55, 69).

The House committee report stated (H. Rep. No. 2287, 74th Cong., 2d Sess., p. 3) that its "purpose * * * is to restore, so far as possible, equality of opportunity in business * * *." The committee quoted (*ibid.*) the following statement from the Federal Trade Commission's Final Report on the Chain-Store Investigation (S. Doc. No. 4, 74th Cong., 1st Sess., p. 24):

As shown elsewhere, the ability of the chain store to obtain its goods at lower cost than inde-

pendents and of large chains to obtain goods at lower cost than small chains is an outstanding feature of the growth and development of chain-store merchandising. These lower costs have frequently found expression in the form of special discounts, concessions, or collateral privileges which were not available to smaller purchasers. In seeking to buy at the lowest possible cost the chain does only what the independent does, but its size and bargaining power are such as to make its efforts yield far better results than those of the independent.

The committee further stated (H. Rep. No. 2287, p. 3):—

—Your committee is of the opinion that the evidence is overwhelming that price discrimination practices exist to such an extent that the survival of independent merchants, manufacturers, and other businessmen is seriously imperiled and that remedial legislation is necessary.

Similarly, the committee emphasized (*id.*, p. 6) that its “guiding ideal” in drafting the bill was “the preservation of equality of opportunity as far as possible to all who are usefully employed in the service of distribution and production * * *.”

The same theme of insuring equality of opportunity to all buyers, large and small alike, and to stamp out discriminatory practices which permit large buyers to gain a competitive advantage over small ones, occurs in the Senate committee report. It states (S. Rep. No. 1502, 74th Cong., 2d Sess., p. 3) that the committee’s “guiding ideal [was] the preservation of equal opportunity to all usefully employed in the service of distribution,” and that “[t]he bill proposes to amend

section 2 of the Clayton Act so as to suppress more effectually discriminations between customers of the same seller not supported by sound economic differences in their business position or in the cost of serving them."

In the light of these "emanations of Congressional purpose manifested in the entire Act" (*Guessefeldt v. McGrath*, 342 U.S. 308, 312); we submit that the broad regulatory provisions of Section 2(c) should not be construed as covering only the particular brokerage evils that were specifically called to the attention of Congress. The following statement of Representative Utterback, chairman of the House conferees, although made with respect to Sections 2(d) and 2(e) is, we submit, equally applicable to Section 2(c):

The existing evil at which this part of the bill is aimed is * * *. *The prohibitions of the bill, however, are made intentionally broader than this one sphere in order to prevent evasion in resort to others by which the same purpose might be accomplished* * * *. [80 Cong. Rec. 9418, emphasis added.]

The facts in the instant case disclose a classic example of a large buyer obtaining a lower price, not given to other buyers, by exerting pressure on a seller. See our main brief, pp. 5-7, 24-25. Respondent, by accepting a reduction of its regular brokerage commission on this unusually large sale to the favored buyer, made it possible for the latter to obtain the precise kind of unfair competitive advantage that Congress sought to prohibit by the Robinson-Patman amendments. In so doing, respondent "granted" * * * [an] allowance

or discount in lieu" of brokerage "to the other party" to the transaction, in violation of Section 2(c).

That section unqualifiedly prohibits "any person * * * pay[ing] or grant[ing] * * * anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof * * *." Neither the specific legislative history that respondent cites, nor the general "Congressional purpose manifested in the entire Act" (*Guessefeldt*, *supra*), supports respondent's narrow interpretation of these provisions²—an interpretation which, we reiterate, would have the effect of qualifying the broad phrase "any person" to mean "any seller," and the broad phrase "any allowance or discount in lieu" of brokerage to mean only an allowance or discount in lieu of secret or fictitious brokerage. We urge this Court to reject respondent's attempt to give this comprehensive language the "narrowest possible meaning" (*United States v. Bramblett*, 348 U.S. 503, 510), which is inconsistent with "the overall purpose of the Act" (*Flemming v. Florida Citrus Exchange*, 358 U.S. 153, 163) to prohibit all preferen-

² Respondent relies (Br. 28, 33) on the district court decision in *Robinson v. Stanley Home Products, Inc.* However, in recently affirming, the Court of Appeals for the First Circuit (*per* Judge Aldrich) specifically noted that it has "some doubts about the case of *Henry Broch & Co. v. Federal Trade Commission*, 7 Cir. * * *." *Robinson v. Stanley Home Products, Inc.* (C.A. 1), No. 5573, Dec. 10, 1959, slip op., note 1, p. 2.

tial practices by which large buyers could obtain discriminatory competitive advantages over small ones.

Respectfully submitted,

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³ Respondent's contention (Br. 46-55) that the Commission's interpretation of Section 2(c) is "contrary to antitrust proscriptions" is fully answered at pages 25-28 of our main brief. In addition, we point out that price concessions to large buyers are not necessarily passed on by them to consumers. Representative Utterback noted this fact more than 20 years ago. Opponents of the Robinson-Patman Act, in contending that it would raise prices to consumers, acted on the assumption "that the discriminations in price granted to large mass buyers are actually passed on in lower prices to the consumer. * * * There is no evidence that this is true * * * there is nothing to indicate that the discriminations and allowances, such as this bill will forbid, ever find their way to any great extent into price reductions to the consumer" (80 Cong. Rec. 9415).

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1959

FEDERAL TRADE COMMISSION, *Petitioner*

v.

HENRY BROCH & COMPANY, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENT

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SUPPLEMENTAL BRIEF FOR THE RESPONDENT

The attention of the Court is respectfully invited to two supervening significant developments since the filing of respondent's main brief on November 30, 1959: (1) The affirmance of *Robinson v. Stanley Home Products, Inc.*, now officially reported at 178 F. Supp. 230 (D. Mass. 1959), by the Court of Appeals for the First Circuit on December 10, 1959, 28 U.S.L. Week 2292, 1959 CCH Trade Cases par. 69,547; and (2) the publication by the Brookings Institution on December

14, 1959 of *The Price Discrimination Law, A Review of Experience* by Professor Corwin D. Edwards.

These authorities decisively refute the novel and central premise of the FTC's argument in this case that an open price reduction coupled with a reduced broker's fee is a *per se* illegal allowance "in lieu" of brokerage, and confirm that its application of Section 2(c) to fix and maintain brokerage commissions defeats the Congressional design to preserve the benefits of efficient distribution for the consumer through competitive pricing.

(1) The First Circuit's *Robinson* decision unanimously affirmed the District Court's ruling (see Resp. Br. pp. 28, 33) which rejected the contention that a seller's open price reduction made possible by the elimination of his broker's fee was an illegal allowance "in lieu" of brokerage to the buyer.* The opinion of the Court of Appeals, after a footnote reservation as to this case reported as pending on certiorari, went on to decide:

"The matter covered by section 2(c) is unearned brokerage, *per se*, not discrimination. *Federal Trade Commission v. Simplicity Pattern Co.*, 1959, 360 U.S. 55, 65, 27 LW 4389; *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 3 Cir., 1939, 106 F. 2d 667, cert. denied, 1940, 308 U.S. 625; rehearing denied, 309 U.S. 694. * * * There is no necessity for calling something brokerage that is not. If, after ceasing to employ brokers, a manufacturer improperly discriminates between customers, section 2(a) will accomplish the purposes of the act." 28 U.S.L. Week at 2293.

* In that case, as here, the price reduction was "open" in the conventional sense as heretofore understood by the FTC and Congress, *i.e.*, not concealed or camouflaged in the business records of the parties as a brokerage fee to the buyer or his front (see Resp. Br. p. 21).

The holding of the Court of Appeals not only corroborates respondent's legal position in light of this Court's *Simplicity Pattern* opinion (Resp. Br. pp. 19-34), but continues intact the two decades of judicial precedent establishing that a lawful price variation cannot be treated as an illegal brokerage payment—particularly where, as here also, there is no indication “that the parties so described it or that it was designed to reimburse the buyer for some brokerage or servicing obligation ostensibly incurred or even that it was the mathematical equivalent of what the manufacturer formerly paid to the broker.” *Ibid.*

(2) The Brookings Institution study, a 700-page survey by the FTC's former Chief Economist Professor Corwin D. Edwards, significantly finds that the FTC's Brokerage Clause enforcement, in which “the principal organization of brokers in the food field was actively interested,” has served “to encourage certain inefficiencies in the distribution of food” (pp. 71-72, 150-151). The study quotes and confirms the Report of the Attorney General's National Committee to Study the Antitrust Laws that the FTC's application of Section 2(c) “clogs competition in the channels of distribution, and exacts tribute from the consumer for the benefit of a special-business class.” *Ibid.*

The Brookings Institution study also deflates the FTC's claims, now joined by a group of organized retailers, that the instant application of the Brokerage Clause, notwithstanding its novelty and conflict with antitrust objectives, is nevertheless justified by the “overall purpose” of the Robinson-Patman law against discrimination in favor of “large buyers” (Reply Br. pp. 6-7). According to the Brookings Institution findings, “the brokerage provision has almost no relevance.

to a policy toward price discrimination" (p. 644).
Indeed,

"The effect of the brokerage cases on the relative well-being of corporate chains and small independent distributors is uncertain, with considerable probability, however, that on balance the independents have been hurt rather than helped. * * * The difficulties that the brokerage provision presents to independents appear to be more enduring, more general, and less readily avoided than those that it presents to the corporate chains" (pp. 151-152).

Finally, the study's recommendation that any harmful discriminatory practice by "powerful buyers" should be checked "directly through proceedings against the buyers who engage in it" (pp. 642-643) highlights the anomaly of the FTC's position here—of pursuing a small broker under an inapplicable provision, while denouncing the "large buyer" but avoiding the provisions pertaining to discrimination on the part of sellers and buyers.

These supervening developments confirm that the Federal Trade Commission's theory of this case has strayed equally far from the letter and the spirit of the antitrust laws, and hence can muster the concurrence of some organized merchants but not of the

American consumer or the Antitrust Division of the
Department of Justice of the United States.*

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* Cf. the Justice Department's Sherman Act complaint against a retail grocers' association announced December 31, 1959, designed to eliminate "restraints in the sale of groceries" in order to ensure "more vigorous competition in one of the most essential of all cost-of-living items, namely food," and "to permit consumers to purchase groceries in a freely competitive retail market." *United States v. San Diego Grocers Ass'n, Inc.*, Civ. No. 2347 (S.D. Calif. 1959).